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THE IRISH REPORTS.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS,

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND:

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,
THE HIGH COURT OF JUSTICE,
THE COURT OF BANKRUPTCY,
IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY
WILLIAM GREEN,
BARRISTER-AT-LAW.

1896.

VOL. I.

CHANCERY AND PROBATE DIVISIONS, AND COURT OF BANKRUPTCY.

DUBLIN:
PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,
BY EDWARD PONSONBY,
116, GRAFTON-STREET, DUBLIN.
1896.

BIBL. LONDIN. UNIV.

DUBLIN:
PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND,
At the University Press,
BY PONSONBY AND WELDRICK.

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Lords Justices of Appeal.

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The Right Hon. Charles Robert Barry.
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The Right Hon. John Atkinson.

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[These Reports will be cited as follows :—[1896] 1 I. R.]

REPORTERS.

Court of Appeal,	Robert D. Murray, G. Y. Dixon,	Barristers-at-law.
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Land Judge and Court of Bankruptcy,	William Green,	Barrister-at-law.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Athy Guardians *v.* Murphy, 65

B.

Bank of Ireland, *Ex parte; In re* Old Bushmills Distillery Co., 301, 329
Bannatyne *v.* Ferguson, 149, 162
Barcroft *v.* Murphy, 590
Battersby's Trusts, *In re,* 600
Bergin, Langan *v.* (Bergin, deceased), 331
Brannigan *v.* Murphy, 418
Brydon, *Ex parte; In re* Old Bushmills Distillery Co., 301, 329

C.

Carroll and Lyons' Contract, *In re,* 383, 390
Collings *v.* Wade, 340, 345

D.

De Burgho's Estate, *In re;* Scottish Widows' Fund and Life Assurance Society, Petitioners, 274

PAGE

De Moleyns, Leahy *v.* 206, 223
Duffield *v.* M'Master, 370

F.

Ferguson, Bannatyne *v.* 149, 162
Fitzsimons *v.* Skelly, 416

G.

Gabbett, Minchin *v.* 1
Gaussen, M'Mahon *v.* 143
Godley's Estate, *In re;* Godley (Executrix of) Petitioner, 45
Greer *v.* Waring (*In re* Waring, deceased), 427
Grogan's Estate, *In re,* 614

H.

Halligan *v.* Halligan, 244, 248
Harlech (Baron) *Ex parte; In re* Waterford and Limerick Railway Co., 507
Hoban, Lonergan *v.* (Hoban deceased), 401

J.

PAGE
Jordan, Roche *v.* 494
Joyce, Kevans *v.* 442, 473

K.

Kavanagh *v.* Workingman's Benefit Building Society, 56
Keogh, Grantor; Kettle, Grantee, 285
Kettle, Grantee; Keogh, Grantor, 285
Kevans *v.* Joyce, 442, 473

L.

Langan *v.* Bergin (Bergin, deceased), 331
Leahy *v.* De Moleyns, 206, 223
Le Bert, Russell *v.* (*In re* Stubbs), 334
Lonergan *v.* Hoban (Hoban, deceased), 401
Lough Neagh Ship Co., *In re; Ex parte* Thompson, 29
Lyons and Carroll's Contract, *In re*, 383, 390

M.

M'Henry *v.* M'Henry, 60
Mackesy *v.* Mackesy, 511
M'Mahon *v.* Gaussen, 143
M'Master, Duffield *v.* 370
M'Mechan *v.* Warburton, 435, 441
M'Williams and Thompson's Contract, *In re*, 356, 362
Magrath, In the Goods of, 203
Mahon's Estate, *In re*, 273
Minchin *v.* Gabbett, 1
More-Smyth *v.* Mountcashell (Earl of), 243
Mountcashell (Earl of), More-Smyth *v.* 243
Murphy, Athy Guardians *v.* 65
———, Barcroft *v.* 590
———, Brannigan *v.* 418

O.

PAGE
Old Bushmills Distillery Co., *In re; Ex parte* Brydon; *Ex parte* Bank of Ireland, 301, 329
O'Leary's Estate, *In re*, 283
O'Neill, *Ex parte; In re* Portstewart Tramway Co., 265

P.

Pembroke and Montgomery (Earl of) *v.* Warren 76, 104, 142
Pennefather, deceased; (Savile *v.* Savile), 249
Porter *v.* Walsh, 148
Portstewart Tramway Co., *In re; Ex parte* O'Neill, 265
Provincial Bank of Ireland, Rearden *v.* 532, 571

R.

Rearden *v.* Provincial Bank of Ireland, 532, 571
Richardson's Trusts, *In re*, 295, 301
Roche *v.* Jordan, 494
Rochfort *v.* Seaton, 18
Russell *v.* Le Bert (*In re* Stubbs), 334

S.

Savile *v.* Savile (Pennefather deceased), 249
Sawyer's Trusts, *In re*, 40
Scottish Widows' Fund and Life Assurance Society, Petitioners; *In re* De Burgho's Estate, 274
Seaton, Rochfort *v.* 18
Sinclair *v.* Sinclair, 603, 613
Skelly, Fitzsimons *v.* 416
Slacke's Estate, *In re*; Slacke, Petitioner (No. 1), 181
——— ———; ——— (No. 2), 191
Smith *v.* Whitmore, 520
Stubbs, *In re*; (Russell *v.* Le Bert), 334

T.

PAGE

Thompson and M'Williams' Contract, *In re*, 356, 362
Thompson, *Ex parte ; In re* Lough Neagh Ship Co., 29

V.

Vereker, In the Goods of, 200

W.

W., P. J., Arranging debtor, *In re*, 44
Wade, Collings *v.* 340, 345
Walsh, Porter *v.* 148
Warburton, M'Mechan *v.* 435, 441
Waring, Greer *v.* (*In re* Waring deceased), 427
Warren, Pembroke and Montgomery (Earl of) *v.* 76, 104, 142
Waterford and Limerick Railway Co.; *Ex parte* Harlech (Baron), 507
White, In the Goods of, 269
Whitmore, Smith *v.* 520
Workingman's Benefit Building Society, Kavanagh *v.* 56

TABLE OF CASES CITED.

A.

PAGE.

Acherley *v.* Vernon, . . 420
Acheson's Estate, *In re*, 275, 282
Adams *v.* Alexander, . . 287
Agra Bank, *Ex parte*, . . 537
Ailesbury (Marquis of) and Iveagh (Lord), *In re*, . . 509
Alexander *v.* Mills, . . 392
Allen *v.* Farthing, . . . 297
Allridge *v.* Wallscourt, . . 432
Anderson *v.* Anderson, . 106, 123
—— *v.* White, 163, 164, 174
Andrews *v.* Weall, . . 21, 22, 25
Anglo-Italian Bank *v.* Davies, 31
Armstrong *v.* Reeves, . . 420
Arnold *v.* Poole (Mayor of), . 70
Arthur, In the Goods of, . 271
Astley *v.* Milles, . . . 47
Attorney-General *v.* Boultbee, 420
—— *v.* Delaney, . 424
—— *v.* Drapers' Co., 337, 338
—— *v.* Guilford, Godalming and Woking Local Hospital Board, . . . 138
—— *v.* Hall, . . 424
—— *v.* Oxford (Bishop of), ... 421
—— *v.* Wilson, . 539
Attorneys' and Solicitors' Act, 1870 (1 Ch. D., 573), . . 474
Aylesford (Earl of) *v.* Morris, 472, 475
Ayscough *v.* Savage, . 297, 298

B.

Baker *v.* Monk, . . . 475
Baker, *Re*, ... 236
Bandon (Lord) *v.* Becher, . 473
Banister, *In re*, . 387, 390, 392
Bartlett *v.* West Metropolitan Tramways Co. . . . 267

PAGE

Barton's Trusts, . . . 406
Barton-upon-Humber and District Water Co., *Re*, . . 267
Bawden, *In re*, . . . 500, 502
Bazeley *v.* Forder, . . . 248
Belding *v.* Read, . 155, 165, 166
Bentinck *v.* London Joint Stock Bank, ... 322
Benyon *v.* Fitch, . . . 475
Berry *v.* Gibbons, . . 407, 415
Best *v.* Hamand, . . 387, 393
Bevan *v.* White, 253, 256, 257, 259
Birch, *Re*, ... 236
Birt, In the Goods of, . 270, 271
Blackman *v.* Fysh, . . 31
Blair *v.* Bromley, . 346, 353, 355
Blake *v.* Gale, 207, 216, 223, 238, 241, 242
Blenkhorn *v.* Penrose, . 387, 393
Bolland, *Ex parte ; In re* Clint, 154, 164, 174
Bolton Partners *v.* Lambert, 65, 69, 70, 71, 74, 75
Bonney *v.* Ridgard, . . 220
Bostock *v.* Floyer, . . 21
Boulton *v.* Beard, . . . 21
Bournemouth Commissioners *v.* Watts, ... 69, 70
Bowen *v.* Lewis, . 251, 260, 264
Bowers *v.* Bowers, . . 297, 299
Bowling and Welby's Contract, 474
Box *v.* Barrett, . . . 332
Bradford Banking Co. *v.* Briggs, 537, 539, 540, 541, 543, 555, 556, 557, 558, 560, 562, 563, 566 567, 568, 576, 578, 581, 585, 586, 588, 589
Bramwell *v.* Lacy, 97, 106, 115, 121, 135
Brentford and Isleworth Tramways Co., *In re*, . . 266, 267
Brewer *v.* Broadwood, . . 387
Bridge *v.* Bridge, . . . 437
Bridger *v.* Ramsay, 253, 256, 257
Brier *v.* Evison, . . . 22

PAGE
Brodie *v.* Brodie, 606
Bromley *v.* Smith, 472
Brown *v.* Kennedy, 437
Brunton *v.* Electrical Engineering Corporation, 311, 317, 321, 322
Butler *v.* Smith, 527, 529

C.

Cahill *v.* Cahill, 526, 528, 529
—— *v.* Martin, 526, 528
Carroll *v.* Hargrave, 594, 595
Carson's Estate, *In re*, 275
Chamberlayne *v.* Brockett, 421
Chambers, *In re*, 399
Champney *v.* Davy, 332
Cherry *v.* Mott, 421
Childe, *Re*, 251, 253, 263
Chinnery *v.* Evans, 210, 234, 262
City of Dublin Junction Railways, *In re: Ex parte* Kelly, 509
Cleary *v.* Fitz Gerald, 168
Cleary's Trusts, 251, 252
Cleaver *v.* Bacon, 104, 138
Clifford *v.* Clifford, 514
Clowes, *In re*, 514, 518, 519
Coffee *v.* Cooper, 399
Cole *v.* Gibbons, 475
Commissioners of Charitable Donations *v.* Deey, 602
Congreve *v.* Palmer, 601
Cooke *v.* Cooke, 244
Coombe *v.* Carter, 155, 165, 166, 173, 176
Coope *v.* Cresswell, 209
Cooper *v.* Slight, 392
Cooper, *Ex parte*, 460
Cope, *In re;* Cope *v.* Cope, 360, 362, 366, 368
Cowper Essex *v.* Acton (Local Board for) 115
Cox *v.* Cox, 244
Creed *v.* Creed, 431, 499, 500
Creery *v.* Lingwood, 298, 299
Crofton, *In re*, 374, 377, 380
Crowe *v.* Ballard, 475, 491

D.

Dallow, In the Goods of, 270, 272
Dane and Carey's Contract, *In re*, 400
Daniels *v.* Davison, 196, 375
Dashwood *v.* Peyton, 332
Daun *v.* City of London Brewery Company, 563
Davie's (Sir W.) Case, 163, 167, 179

PAGE
Davies *v.* Nicholson, 219
Dawkins *v.* Tatham, 163
Dawson *v.* Small, 420
Dearle *v.* Hall, 557, 577, 578, 588
Dearle, In the Goods of, 271
De Hoghten *v.* Money, 437
De Lusi's Trusts, 146
Denyer *v.* Druce, 420
D'Epineuil, *In re*, 154, 155
De Trafford *v.* Tempest, 332
Dibb *v.* Walker, 232, 233
Dickinson, *In re*, 32, 38
Dickinson *v.* Teesdale, 211
Dilkes *v.* Broadmead, 215, 219
Dix *v.* Burford, 212
Doe d. Wetherell *v.* Bird, 105, 130, 138
—— d. Bish *v.* Keeling, 93, 96
—— d. Jones *v.* Williams, 411
Dolphin *v.* Robins, 606
Domvile's Estate, 616
Douglas *v.* Willes, 178
Doyle *v.* Blake, 21, 22
Drant *v.* Vause, 375, 380, 381
Drew *v.* Norbury (Lord), 517
Dwyer *v.* Rich, 275, 279
Dykes *v.* Blake, 391

E.

Eager, *Re*, 337
Eaglesford *v.* L'derry (Marquis of), 392
Eales *v.* Cumberland Black Lead Co., 56, 57
Edwards *v.* West, 375
Ellison *v.* Ellison, 436
Elmslie *v.* M'Aulay, 47
Emuss *v.* Smith, 375, 380
English and Scottish Mercantile Investment Trust *v.* Brunton, 311, 314, 316, 322
Ennis and West Clare Railway Co., *In re*, 267
Evans *v.* Llewellyn, 475
Evans, *Ex parte*, 31
Eyre *v.* Eyre, 399

F.

Farmer *v.* Bradford, 514
—— *v.* Lane, 345
Farthing *v.* Allen, 297, 298
Fishmongers Co. *v.* Robertson, 68
Fisk v. Attorney-General, 420
Fleet *v.* Metropolitan Asylums Board, 104, 138
Flood, *In re*, 42

PAGE
Florence Land and Public Works Co., *In re*, 311
Ford *v.* Olden, 468, 474, 475, 492
Forsyth *v.* Bristowe, 234, 235
Foster *v.* Romney, 253, 256, 257
Fowler *v.* Barstow, 417
——— *v.* Willoughby, 499
Freeman *v.* Pope, 46
French *v.* Taaffe, 87
Fry *v.* Lane, 472, 473, 474

G.

Galavan *v.* Dunne, 154, 155, 163, 164, 165, 173, 176
Garthshore *v.* Chalie, 164
Geary's Trusts, *In re*, 420
Gibbs *v.* Guild, 346
Gibbs and West's Case, 311
Gillespie *v.* Alexander, 219
Gillett *v.* Wray, 420
Gillis *v.* Gillis, 606
Ginger d. White *v.* White, 252
Glasgow College *v.* Attorney-General, 420
Gloag and Miller's Contract, *In re*, 387
Goldsmid *v.* Goldsmid, 154, 161, 167
Goodden *v.* Goodden, 245
Gordon *v.* Graham, 563
Gorridge *v.* Irwell India Rubber and Gutta Percha Works, 31
Gosset's Settlement, *In re*, 146
Graham *v.* Wickham, 163, 164
Green *v.* Green, 606, 609
Greenwood, In the Goods of, 271
Gregory *v.* Gregory, 219
Greville *v.* Browne, 434
Grieg *v.* Somerville, 219
Gutteridge *v.* Munyard, 94, 104, 105, 132
Gwynne *v.* Heaton, 475
Gyles *v.* Beausang, 289

H.

Haigh *v.* Haigh, 244
Hamilton *v.* Lane, 345
Hamilton's Windsor Iron Works, *In re*, 311
Hancock *v.* Berrey, 594
Hardey *v.* Green, 154
Harding *v.* Pingey, 474
Hargreaves and Thompson's Contract, *In re*, 392, 395
Harlock *v.* Ashberry, 594
Harris *v.* Fleming, 338
——— *v.* Harris, 247
Harrison *v.* Good, 122

PAGE
Harvey *v.* Aston, 420
——— *v.* Farnie, 606
Hawes *v.* Lauder, 47
Heasman *v.* Pearse, 601
Heath *v.* Pugh, 594
Hemphill *v.* M'Kenna, 275
Henderson-Roe *v.* Hitchins, 211
Hennessey *v.* Bray, 252, 253
Hickes *v.* Cooke, 468
Hickman *v.* Isaacs, 106, 118, 122, 139
Hill *v.* Brown, 47
Hilton *v.* Woods, 474
Hoare *v.* Osborne, 420
Hodges *v.* Hodges, 42
Holroyd *v.* Marshall, 155, 173
Holt *v.* Collyer, 104
Homan *v.* Andrews, 209
Hope *v.* Croydon and Norwood Tramways Co., 267
—— *v.* International Financial Society, 540
Hopgood *v.* Parkin, 21, 22
Hopkinson *v.* Rolt, 562, 563, 565
Horne and Hellard, *In re*, 311
Hornsey Local Board *v.* Monarch Investment Building Society, 595
Hovenden *v.* Annesley (Lord), 595
Howard *v.* Shaw, 196
Hughes *v.* Anderson, 406, 412
——— *v.* Cook, 474
Hugill *v.* Wilkinson, 594
Hunter *v.* Bullock, 420
Hutley *v.* Hutley, 474

I.

Ingram *v.* Soutten, 297
Isaac *v.* Hughes, 399

J.

Jackson *v.* Hamilton, 494, 499, 500, 501, 502, 503, 504
James *v.* Couchman, 436
——— *v.* Kerr, 474, 475
Jarrett *v.* Aldam, 474
Johnson *v.* Brady, 432
——— *v.* Caulfield, 26
——— *v.* Webster, 400, 517
Johnston *v.* Lloyd, 21, 27
——— *v.* Smiley, 390, 395
Jones *v.* Bruce, 432
—— *v.* Morgan, 47
—— *v.* Simes, 142
—— *v.* Smith, 322
—— *v.* Thorne, 95, 129
Jones, In the Goods of, 270
Jordan *v.* Adams, 251, 252, 260

K.

PAGE

Kelly *v.* Rattey, 287, 291, 293
Kemp *v.* Sober, 97
Kempe *v.* Kempe, 244, 247
Kershaw *v.* Kershaw, 252, 253
Kidderminster (Mayor, &c., of) *v.* Hardwick, 65, 68, 73, 75
Kilford *v.* Blaney, 432
Kimpton, In the Goods of, 270
Kingston's (Duchess of) Case, 594
Kinsella *v.* Caffrey, 392
Knatchbull *v.* Grueber, 196
Knight's Trusts, *In re*, 21, 22

L.

Lackersteen *v.* Lackersteen, 436, 439
Lake's Trusts, 594
Lamphier *v.* Despard, 431, 434
Lance *v.* Aglionby, 432
Langley *v.* Brown, 436
Langston *v.* Langston, 332
Large *v.* Cheshire, 421
Larking *v.* Larking, 332
Lawes *v.* Bennett, 374, 375, 377, 379, 380
Leckey *v.* Watson, 514
Le Mesurier *v.* Le Mesurier, 606, 609, 612
Levasseur *v.* Mason and Barry, 31, 32, 36
Lewis d. Ormond *v.* Waters, 252
Lindsay *v.* Wicklow (Earl of), 46, 52
Lister *v.* Hodgson, 436, 437, 439, 440
Little, *In re*, 42
Littledale *v.* Thompson, 474
Livesay *v.* Redfern, 499
Lloyd *v.* Thursby, 47
London and Devon Biscuit Co., *In re*, 36
London Joint Stock Bank *v.* Simmons, 321, 322
Long *v.* Short, 494, 499, 500, 501, 502, 503, 504
Louis *v.* Louis, 244
Lovat *v.* Leeds (Duchess of), 163
Lowes' Settlement, 594
Lowndes *v.* Robertson, 61
Lowther *v.* Bentinck, 147
Lynch, *In re*, 289, 293
Lysaght *v.* Lysaght, 47, 52, 53
Lyster *v.* Burroughs, 154, 155, 162, 164, 173

M.

M'Carthy *v.* Daunt, 594, 595, 597
Macclesfield Case, 611

PAGE

M'Creery *v.* Luttrell, 406
M'Grath *v.* Ahern, 526, 527
M'Vicker's Contract, *In re*, 387, 389, 390, 393
Maggi, *In re*, 31
Mara *v.* Browne, 346
March *v.* Russell, 219
Margartson, *In re*, 332
Markey *v.* Coote, 196
Marsh and Granville (Earl), *In re*, 391, 393, 397
Martyn *v.* Blake, 154, 163
Matthews *v.* Matthews, 611
Mellish *v.* Mellish, 251
Mestaer *v* Gillespie, 436
Metcalfe *v.* York (Archbishop of), 154, 163
Middleton *v.* Middleton, 436
Midland Great Western (Ireland) Railway Co., *In re*; *Ex parte* Rorke, 509
Miles *v.* New Zealand Alford Estate Co., 540, 544, 555
Miley *v.* Cape, 398
Milford *v* Milford, 244
Miller *v.* Cook, 475
Millner's Estate, 42
Milner, *In re*, 42
Moggridge *v.* Thackwell, 421
Monsell *v.* Armstrong, 360, 362, 368
Morley *v.* Morley, 48, 52, 53
Mornington *v.* Keane, 154, 156
Morrice *v.* Aylmer, 425
Mullally, *v.* Walsh, 105, 123
Mulqueen's Trusts, 601
Murphy *v.* Ryan, 277
Murray *v.* Pinkett, 537, 540, 569
Mytton *v.* Mytton, 244, 246

N.

National Provincial Bank of England and Marsh, *In re*, 387, 389, 393
Neil *v.* Neil, 244
Neill *v.* Devonshire, 275, 278, 281
Netterville's Estate, *In re*, 275
Nevill *v.* Snelling, 472
New Land Development Association and Gray, *In re*, 367
New London and Brazilian Bank *v.* Broclebank, 540, 544, 555, 581, 588
Niboyet *v.* Niboyet, 609
Nicholson *v.* Tutin, 57
Norfolk Case, 611
Noys *v.* Mordaunt, 13, 375

O.

PAGE

O'Connor *v.* Star Newspaper Co., 417
O'Dell, *Ex parte*, ... 312
O'Mahony *v.* Burdett, . . 297
O'Neill, *In re*, ... 32
Osborne *v.* Bartlett, . . 61
——— *v.* Holyoake, ... 146
Otway *v.* Otway, ... 244
Owen, *Re*, ... 595
Oxford (Mayor &c. of) *v.* Crow, 65, 69, 73

P.

Paget *v.* Huish, ... 431
Palmer *v.* Locke, ... 399
——— *v.* Palmer, 252, 253, 256, 257
Panama, New Zealand, and Australian Royal Mail Co., *In re*, ... 311
Paris Skating Rink Co., *In re*, 474
Parker *v.* Tootal, . . . 264
Patching *v.* Barnett, . 431, 434
Peard *v.* Morton, . . 298, 299
Pears *v.* Laing, . . 209, 232
Pentland *v.* Stokes, . . 595
Perkins, *In re; Ex parte* Mexican Santa Barbara Mining Co., . . 540, 544, 560 588
Phillippo *v.* Munnings, . 211, 212
Phillipson *v.* Kerry, . . 437
Pickersgill *v.* Rodger, . . 6, 15
Pigg *v.* Clarke, . . . 601
Pinède's Settlement, . . 146
Pinkett *v.* Wright, . . . 537, 538
Portman *v.* Home Hospital Association, . . 106, 121, 136
Portsmouth (Borough of) Kingston, &c. Tramways Co., *Re*, 267
Portuguese Consolidated Copper Mines, Limited, *In re*, 65, 69, 70, 71, 75
Potts, *In re*, ... 32, 33, 39
Priestley and Davidson's Contract, *In re*, . . 387, 392
Prince's Case, . . . 362, 363
Proudfoot *v.* Hart, . . 105, 132
Puddephatt, In the Goods of, . 271
Pugh *v.* Heath, . . . 594
Purcell *v.* Purcell. . 253, 256, 257

Q.

Quennell *v.* Turner, . . 431

R.

R. (Murphy) *v.* Donegal (Justices of), ... 528
— *v.* Norwich (Mayor of), . 70
— *v.* Prest, ... 70
— *v.* Saddlers' Co., . . . 473

PAGE

R. C. an arrangingdebtor, *In re* (21 L.R.Ir. 546), . . 44
Rae *v.* Joyce, 462, 473, 474, 475, 477, 480, 491
Raghtigan, In the Goods of, . 271
Raikes *v.* Boulton, . 502, 505
Ramsay *v.* Thorngate, . 432, 433
Ramsbottom *v.* Gosden, . . 436
Rancliff *v.* Parkyns, 1, 5, 6, 12, 14
Rapley *v.* Smart, 104, 119, 132, 138
Ravenshaw *v.* Hollier, . . 163
Rawlin's Trusts, *In re*, . . 392
Reeve *v.* Attorney-General, . 420
Reid *v.* Shergold, . . . 399
Richards and Co., *In re*, . 31
Richardson *v.* Harrison, . . 398
Rickard *v.* Robson, . . 420
Ridgway *v.* Newstead, 207, 217, 218, 219, 223, 236, 237, 239, 240, 241, 242
Rigley's Trusts, *In re*, . . 420
Ringer *v.* Cann, . . . 93
Ripley *v.* Waterworth, . 374, 377
Roakes *v.* Manser, . . 163
Roberts *v.* Dixall, . . . 179
Robinson *v.* Gee, . . . 47
——— *v.* Robinson, 251, 252, 253
Robinson and Sords, *In re*, 359, 363, 368
Roddam *v.* Morley, 209, 232, 234
Rolls *v.* Miller, 105, 107, 121, 132
Rosenberg *v.* Cook, . . 393
Ryan and Cavanagh's Contract, *In re*, ... 363

S.

St. Helen's Smelting Co. *v.* Tipping, ... 113
St. Nazaire Co., *In re*, . . 244
Samuel *v.* Ward, . . . 179
Sandbach and Edmundson's Contract, *In re*, . . . 393
Saunders *v.* Saunders, . . 244
Saunders-Davies, *In re*, 494, 560, 501, 502, 504, 505
Savile *v.* Blacket, . . . 499
Sayer *v.* Sayer, . . . 205
Scale *v.* Rawlins, . . . 392
Scott and Alvarez's Contract, *In re*, . 387, 390, 393, 396
Scott *v.* Scott, ... 594
Seaton *v.* Lewis, . . . 480
Segrave, *In re*, . . . 42
Shaw *v.* Attorney-General, 606, 609
—— *v.* Gould, . . . 606
Shea *v.* Moore, ... 596
Sheddon *v.* Sheddon, . . 473
Shelley's Case, . . 255, 260
Shepherdson *v.* Dale, . . 601

PAGE
Shirley *v.* Fisher, 399
Shropshire Union Railways and Canal Co. (Directors of) *v.* Reg., 539
Sibley's Trusts, 601
Simpson *v.* Molsons' Bank, 321, 322, 541, 543, 544, 555
Sinnett *v.* Herbert, 420
Slacke's Estate (No. 1), 194
Smith *v.* Andrews, 277
—— *v.* Death, 400
Société Générale de Paris *v.* Walker, 541, 543, 544, 557, 558, 559, 560, 564, 565, 575, 577, 580, 582, 588
Somerset *v.* Poulett, 345, 352, 355
Spackman *v.* Timbrell, 215
Speight *v.* Gaunt, 21, 22, 25
Spirett *v.* Willows, 46, 48
Spurway *v.* Glyn, 431
Stack *v.* Royse, 154, 155, 163, 164, 174
Stanley *v.* Stanley, 528
Stewart, *Ex parte*, 582, 588
Studdert *v.* Von Steiglitz, 252, 253, 264
Sturges *v.* Bridgman, 96, 104, 105
Sturla *v.* Freccia, 62
Suffield and Watts, *In re*, 244
Sutton *v.* Wilders, 21, 22
Swain *v.* Bringeman, 345, 352, 354
Swinfen *v.* Swinfen, 48, 51, 53

T.

Tailby *v.* Official Receiver, 154, 155, 157, 164, 166, 169, 176
Taylor *v.* M'Keand, 322
Thacker *v.* Key, 164
Thomasset *v.* Thomasset, 244
Thorne *v.* Cann, 50
—— *v.* Heard, 343, 346, 352, 355
Thornton *v.* Thornton, 5
Timins *v.* Stackhouse, 601
Tipping *v.* Eckersley, 105, 119
Tod-Heatly *v.* Benham, 90, 92, 97, 99, 104, 105, 113, 115, 116, 131, 137, 141
Tollemache *v.* Tollemache, 606, 607, 609, 610, 611
Tollemache's Divorce Bill, 607
Topham *v.* Booth, 594, 595
Townley *v.* Bedell, 374, 375, 377
Tufnell *v.* Page, 514
Turcan, *In re*, 154
Turner *v.* Collins, 436
Tyler *v.* Yates, 475
Tyrone (Earl of) *v.* Waterford (Marquis of), 251, 252, 253, 261, 262, 263, 264

U.

Ulster Permanent Building Society and Junior Army and Navy Stores, *In re*, 526, 527, 529

V.

PAGE
Van Hagan's Trusts, 146
Venn and Fuze's Contract, *In re*, 363
Vickery *v.* Deane, 288, 293

W.

Walpole *v.* Conway (Lord), 163, 167
Walter *v.* Selfe, 105, 134, 135, 136, 140
Wansted Local Board of Health *v.* Hill, 104, 105, 130, 136
Want *v.* Campain, 345, 352, 354
Watkins *v.* Frederick, 252, 263, 264
Webb *v.* Needham, 205
—— *v.* Rorke, 468, 475, 492
Weeding *v.* Weeding, 374, 375, 380, 381
Welby *v.* Rockcliffe, 431
Welstead, *In re*, 420, 423
Werderman *v.* Société Générale d'Electricité, 541
West *v.* Burney, 399
—— *v.* West, 440
West and Smith *v.* Wilby, 205
Westropp *v.* Elligott, 87
Wheatley *v.* Silkstone and Haigh Moor Coal Co., 311, 314, 315
Whieldon *v.* Whieldon, 244
White *v.* Anderson, 154, 155
—— *v.* Grave, 146
—— *v.* White, 436
White, In the Goods of, 270, 271
Whitely *v.* Learoyd, 21, 22
Wild's Case, 255
Wilkinson *v.* Rogers, 105, 119, 132
Williamson *v.* Naylor, 283
Wilson *v.* Wilson, 606, 607
Winter *v.* Winter, 337
Wintour *v.* Clifton, 5, 6, 15, 16
Wiseman *v.* Beake, 475, 484
Withernsea Brickworks, *In re*, 31
Withington Local Board of Health *v.* Manchester (Corporation of), 93, 104, 105, 117, 131, 136
Wood, *In re*, 42
Woodhouse *v.* Meredith, 375
Woodroofe *v.* Woodroofe, 297, 298
Wright *v.* Goff, 436
Wright, *In re*, 42
Wrixon *v.* Vize, 594, 595, 596
Wych *v.* East India Co., 595

Y.

Yates, *In re*, 601, 602
Yates *v.* University College, London, 420
Yelverton *v.* Yelverton, 606
Yorkshire Railway Wagon Co. *v.* Maclure, 312

CORRIGENDA.

Page 443, line 16, *after* "set," *read* "aside."

,, 571, LORD JUSTICE BARRY was present, and concurred in the judgment of the Court of Appeal.

MEMORANDUM.

IN the Hilary Vacation, 1896, the Right Hon. Mr. JUSTICE MONROE resigned. JOHN ROSS, Esq., Q.C., was appointed his successor.

CASES

DETERMINED BY

THE CHANCERY AND PROBATE DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE COURT OF BANKRUPTCY IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1896.

MINCHIN *v.* GABBETT AND OTHERS.

(1894. No. 937.)

M. R.
1895.
Feb. 7, 8, 9.

Will—Election—Intention of testator—Recitals—Scope of will—Applicability of limitations—Onus *of proof.*

In considering a question of election raised by the will of a testator the Court must look at the whole scope of the will, with a view to see if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. The question is what was the intention of the testator as gathered from the whole will, seeing the language he has used and what it fairly means. *Prima facie* the Court must construe the words of disposition as applying to an estate which the testator had power to dispose of, if the words will fairly apply to it; and in order to raise a question of election it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another.

Lord Rancliff v. *Parkyns* (6 Dow, 149) discussed.

BY deed dated 8th July, 1842, and made between George Minchin of the first part, John Minchin of the second part, Anne Hall of the third part, and Charles Humphrey Minchin and John Andrews of the fourth part, being the settlement made in consideration of the marriage then intended and afterwards solemnized between John Minchin and Anne Hall, the lands of Busherstown were settled on George Minchin (the father of the intended bridegroom) for life, subject to an annuity of £400, with remainder to John Minchin for life, with remainder in tail male to such son of the marriage, as he (John) should appoint. Then followed a remainder in default of appointment to the first and other sons of the marriage in tail male. There was then a power to charge the settled lands with £2500 in the event of there being three or more younger children of the marriage, and there was a proviso that in case there should not be any son, but only daughters of the marriage, their father, John Minchin, might appoint the lands to any one of the daughters, or dispose of them as he might think fit. There was then an ultimate remainder in fee simple to John Minchin.

In addition to this interest in the lands of Busherstown, John Minchin was entitled in fee simple to the retrenched lands of Barnagrotty and the lands of Rathnaviogue.

By his will, dated 12th September, 1850, he provided as follows:—

"Whereas I am entitled by my marriage settlement under certain contingencies to dispose of the house and lands of Busherstown, in the Barony of Clonlisk and King's County, together with the appurtenances therewith (my father having a life estate in the said lands), I do therefore will and bequeath the said house and lands of Busherstown to my eldest son, George John Minchin, and in case my eldest son, George John Minchin, should die without leaving any issue lawful, in such case I leave the aforesaid lands of Busherstown to any second or any other son I may hereafter have, and yet to be born off the body of my wife, Anne Minchin, the elder to be preferred to the younger by seniority of years and priority of birth, but in case no son of mine, begotten off the body of my wife, Anne Minchin, should live to inherit the aforesaid lands of Busherstown or should leave any lawful issue, in such case I do bequeath the aforesaid lands of Busherstown to my eldest daugter, Elizabeth Agnes Minchin, begotten off the body of my wife, Anne Minchin, for her sole and separate use, and free from the control and debts of any husband with whom she may intermarry, and to go to my said daughter's male issue after her death, the elder to be preferred to the younger by seniority of years and priority of birth, and in default of male issue to her eldest daughter." In default of issue of Elizabeth the testator devised to his other daughter Alice, in like manner with similar limitations. And in the event of both his daughters dying without issue, he devised the lands of Busherstown "to any other child I may have hereafter by my wife, Anne Minchin, to be born after the date of this will."

Testator then devised his retrenched lands of Barnagrotty to his eldest son, George John Minchin, with similar limitations and remainders in favour of his (the testator's) daughters, and any other child of the marriage to be thererafter born. By his will he devised the lands of Rathnaviogue in the same way, except that he transposed the order in which the gifts over to his daughters were to take effect. By the will there was a power of leasing given to the testator's executors, trustees, and any "children" in possession. He appointed his father George Minchin, his wife Anne Minchin, and John Andrews, to be executors and trustees of his will. The testator, John Minchin, died in 1851, and probate of his will was granted on the 9th of August of same year to Anne Minchin, saving the rights of George Minchin and John Andrews.

George Minchin died in 1863 and John Andrews in 1879, without having obtained probate of the said will.

The plaintiff George John Minchin was the only son of the marriage who survived his father, and he attained age on the 28th April, 1866. He thereupon entered into possession of the rents and profits of the lands of Busherstown, Barnagrotty, and Rathnaviogue. There was another son of the marriage, but he died in the lifetime of his father John Minchin. He was not in existence at the date of the will. The two daughters, Elizabeth Agnes and Alice Minchin, survived their father; there was one other daughter who pre-deceased him. Elizabeth Agnes married Richard Gabbett in 1863, but there was no issue of the marriage. Alice Minchin married Richard Welch in 1868, and there were six children, issue of the marriage, four of whom were infants at the commencement of the action. By his statement of claim in the action, the plaintiff George John Minchin asked the Court to declare (1) that he was entitled to the lands of Busherstown as tenant in tail in possession; (2) that he was entitled to the retrenched lands of Barnagrotty for an estate in fee simple, subject to an executory devise over, in the event of his death without leaving issue, in favour of Elizabeth Agnes Gabbett; (3) That he was entitled to the lands of Rathnaviogue for an estate in fee simple, subject to an executory devise over, in the event of his death without leaving issue, in favour of the defendant Alice Welch.

The defendants Welch, by their statement of defence, submitted that, as regards the lands of Busherstown, the plaintiff was bound to elect between his rights thereto under the deed of the 8th of July, 1842, and the estate and benefits conferred on him by the will of John Minchin; and these defendants alleged that the plaintiff accepted the estate and benefits conferred on him by the said will; and had made his election to take under the said will; and alternatively submitted that the plaintiff was now bound to elect whether he would take under the said will or against it.

There was no appearance on behalf of the defendant Elizabeth Agnes Gabbett, or her husband the defendant Richard Gabbett.

On the 5th February, 1895, the plaintiff moved for judgment against the defendants Welch, who were *sui juris*, as upon the admissions contained in their defence, and against the minor defendants as upon the pleadings in the action.

Price, Q.C. (with him *Campbell, Q.C.*, and *G. Y. Dixon*), for the plaintiff:—

We submit that no case of election arises, as there is no indication in the will that the testator was dealing with any estate except that which was his own to dispose of. As regards the lands of Busherstown, the testator was clearly dealing with the ultimate remainder in fee reserved to him under the settlement of 1842. The recital that he was entitled "under certain contingencies" shows that he did not intend to dispose of an immediate estate, subject only to his father's life interest, but of the ultimate reversion in the lands, which could only come into possession on the happening of certain events. At any rate, there is no such improbability that he was dealing with the ultimate remainder he was entitled to dispose of as to put the plaintiff to election. The case comes within the principle of *Lord Rancliff* v. *Parkyns* (1). In *Wintour* v. *Clifton* (2) the inaptitude of the limitations in the testator's will to the reversion he had power to dispose of, and the creation by him in his will of powers of jointuring and charging portions, were the grounds upon which the Court decided the case. See judgment of Turner, L.J., p. 651. Here the limitations are not inapt to the estate which was the testator's own, and effect can be given to the whole will as regards the lands of Busherstown, beause the limitations and estates provided for can take effect by virtue of the ultimate remainder in fee reserved to the testator: Lord St. Leonard's Law of Property, p. 448; *Thornton* v. *Thornton* (3).

In dealing with the lands of Busherstown, after the recital that he was entitled under certain contingencies, he proceeds, "I do *therefore* will and bequeath," whereas the other devises commence, "I do now will and bequeath." This distinction supports our contention. No case of election arises, and the plaintiff is entitled to the declaration asked for in the statement of claim.

Stanley, *Q.C.*, and *Meredith*, *Q.C.* (with them *H. Wilson*), for the defendants Welch:—

The plaintiff is bound to elect between his rights to the lands of Busherstown under the deed of the 8th July, 1842, and the estate and benefit conferred on him by the will of his father. It would be a very forced construction to hold that the testator did not mean to dispose of a present interest in the lands, subject only to the life estate of his father which he directly mentions. On the other hand, it would be impossible, we contend, to read the devise as a gift to the plaintiff of a remainder in fee after a prior estate in tail male, already vested in the plaintiff under the provisions of the settlement, as the first, and at that time the only living son of the marriage. The meaning of the testator is clear. The question is, Did the testator mean to dispose of lands which were not his to dispose of, having been put in settlement, and placed out of his power, except by appointing them in favour of a son for an estate in tail male? It is a question of intention, and the whole will is to be considered: Farwell on Powers, p. 338; *Wintour* v. *Clifton* (1); *Pickersgill* v. *Rodger* (2).

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(1) 6 Dow, 149. (2) 8 De G. M. & G. 641. (3) 11 Ir. Ch. R. 474.

Taking the whole context of this will, it must be construed as disposing of an immediate interest, subject to the outstanding life estate. The power of leasing contained in this will supports our contention.

Campbell, Q.C., in reply:—

The *onus* lies on those who assert that a case of election arises, and they must show clear proof of an intention on the part of a testator to dispose of an estate which was not his own. In *Wintour* v. *Clifton* (1), at p. 650, Turner, L.J., says, "It must be clear that there was an intention on the part of a testator to dispose of what he had not the right or power to dispose of."

If the words *per se* are capable of application to the particular interest which a testator was entitled to dispose of, no question of election arises. There must be the utter improbability that the testator could have meant otherwise than to deal with what was his own. See Lord Eldon's judgment in *Lord Rancliff* v. *Parkyns* (3), at page 179. The words used in this case are undoubtedly capable of application to the estate the testator had.

Taking the whole scope of the will, it is manifest that the substantial object of the testator's bounty was the plaintiff, and assuming that the testator was acquainted with the trusts of the settlement, he knew the plaintiff had only an estate in tail male, and he meant to give him all he could, and that was an estate in fee simple in remainder to which, in certain contingencies, he (the testator) was entitled to. There is nothing strange in such a disposition. The decision in *Wintour* v. *Clifton* (1) turned largely upon the inapplicability of the limitations. And in that case the property devised was dealt with *in globo*. If it had been

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(1) 8 De G. M. & G. 641. (2) 5 Ch. Div. 163. (3) 6 Dow, at p. 179.

the intention of the testator in this case to devise Busherstown as an estate in possession, there is no reason why the three estates should not have been dealt with together, leaving the will to operate in the same way on all the property as on one portion.

Feb. 9.

The Master of the Rolls:—

In this case George John Minchin is the plaintiff, and the defendants are Elizabeth Agnes Gabbett and Richard Joseph Gabbett, who have entered no appearance, and certain other defendants, named Welch (some of whom are infants) who have appeared, and against whom the action now comes on for hearing on motion for judgment, the case being formally proved as against the minors by affidavit.

The action is brought for a declaration as to the plaintiff's rights in respect of three different denominations of lands. The defendants Welch have put in a defence raising a question of election which is the only one that has been argued before me.

A marriage settlement was executed the 8th July, 1842, on the occasion of the marriage of John Minchin, the father of the plaintiff, with Anne Hall. At that time George Minchin, the father of John, was living, and was in possession of what I gather (from the documents in the case) was the family property of Busherstown.

That settlement is very peculiar in its form. It is as bad a piece of conveyancing as one often meets with. It settles the lands of Busherstown on George for life, subject to an annuity of £400, with remainder to John for life, with remainder in tail male to such son of the marriage as John should appoint. This power of appointment was merely a power of selection among the sons. The donee of the power had no authority to determine the estate the son was to take; that was a defined estate in tail male. Then follows a remainder in default of appointment to the first and other sons of the marriage in tail male. Next comes a power to charge the settled lands with £2500, in the event of there being three or more younger children of the marriage, which is followed by a proviso that in case there shall not be any son but only daughters

M. R.
1895.
MINCHIN
v.
GABBETT.

of the marriage their father might appoint the lands to any one of the daughters, or dispose of them as he might think fit, a clause which would have given him power to dispose of the lands absolutely in the event of there being only daughters, leaving them unprovided for. Then follows an ultimate remainder in fee-simple to John Minchin. The case turns upon that ultimate estate which was reserved to John Minchin and his heirs; and oddly enough this ultimate remainder in fee is not mentioned nor alluded to in any way in the statement of claim, and indeed the question of election is not referred to in it at all. Besides the interest in Busherstown, which he took under the settlement, John Minchin was also entitled in fee-simple to the retrenched lands of Barnagrotty and the lands of Rathnaviogue. Barnagrotty is in King's County, as is also Busherstown ; I do not know if they adjoin. The lands of Rathnaviogue are in Tipperary.

In the events which have happened the plaintiff is the only surviving son of that marriage. There was another son, who died in the lifetime of his father, but it does not appear whether he was born after the will, or had died before it. He was not alive at its date. There were also three daughters, one of whom predeceased her father. In the events that happened there were therefore an only son and two daughters. At the date of the will, the father, George, was still living, and was entitled to a life estate under the settlement of 1842.

The will is as badly drawn as the settlement. There is this excuse for it however, that probably it was not drawn by a professional person. Though there is an affectation of legal language about it, it is used in a style that one would not willingly attribute to a solicitor's clerk. It was probably not drawn by a solicitor or professional lawyer. One of the witnesses to it was a merchant in Roscrea, and the other a clerk and shopman, probably in his employment, so that it would appear probable that the will was prepared without professional advice, and was the emanation of the testator's own mind.

The will commences as follows: "Whereas I am entitled by my marriage settlement under certain contingencies to dispose of the house and lands of Busherstown, in the Barony of Clonlisk and King's County, together with the appurtenances therewith, and containing about 712 statute acres, be the same more or less (my father having a life estate in the said lands), I do therefore will and bequeath the said house and lands of Busherstown in the Barony of Clonlisk and King's County to my eldest son, George John Minchin, and in case my eldest son, George John Minchin, should die without leaving any issue lawful, in such case I leave the aforesaid lands of Busherstown to any second or other son I may hereafter have, and yet to be born off the body of my wife, Anne Minchin, the elder to be preferred to the younger by seniority of years and priority of birth." Pausing there, it would be impossible for any one who did not know anything about the previous settlement to read that except as disposing of an immediate interest to which testator was entitled, or over which he had control, and which would at once take effect upon his own death, subject to the life estate of his father which he expressly mentions. No reason can be suggested why, on any hypothesis, he should refer to the estate for life, and omit all reference to the far more extensive interests and estates limited by the settlement prior to the ultimate remainder in fee. "Dispose of" is a neutral term; but it seems to me rather more apt to describe the exercise of a power of appointment than to point to a direct devise or bequest. The disposition is to be "under certain contingencies." Mr. Price and Mr. Campbell relied strongly on these words as showing that the testator was purporting to deal with the interest he himself had under the settlement, the ultimate remainder of the lands which could only come into existence in certain remote contingencies. But I think these words are certainly not inapplicable to the state of affairs which the testator had, as I believe, then before his mind. He had one son. He was not long married and might expect to have more. He had had four or five other children, one of whom had died. It seems to me that these phrases do not necessarily refer to an ultimate estate in remainder, which was so obscure that it escaped the notice of the pleader in this action. If the intention was to deal with an ultimate remainder in fee, which might in all probability never take effect at all, one would expect that, if all the prior limitations of the settlement were before the mind of the testator, he would not have singled out only the first life estate of his father. But he says: "My father having a life estate in the lands," as if this life estate was the only thing intervening between him and the immediate estate in fee he proceeds to deal with. The phrase is almost coercive to show that, subject to the life estate of his father, he intended to dispose of Busherstown as property in possession.

"I do therefore will and beqeath"; stress was also laid on the word "therefore." Mr. Price pointed out that the testator commenced each of the other devises of lands in the will with the words, "I do will and bequeath," whereas in dealing with Busherstown he introduces the devise with the words, "I do therefore will and bequeath." I have been unable to see what was the exact point which the use of the word "therefore" was conceived to suggest in favour of the plaintiff's contention. I think it merely means "because I am so entitled." "Will and bequeath" were also relied upon as indicating a disposition by virtue of the will, and not one in pursuance of provisions of the settlement; and no doubt these are the ordinary words used in disposition by will. But they are also perfectly applicable to the execution of a power of appointment, and equally apt to raise the question of election, if the testator thought he was dealing with property which was his own by estate or power, but which was not so in reality. In any event, the estate which the will purports to give the plaintiff is an estate in fee simple, subject to an executory gift over in the event of his dying without leaving lawful issue at his death. That is a curious disposition if it is to be read as a remainder in fee after a prior estate in tail male already vested in the son under the settlement, because as tenant in tail the plaintiff could bar the entail, and it is not easy to see what object any rational testator could have in making such a disposition, since in the event of the estate tail being barred, the estate conferred by the will would be defeated, or at least would never arise, and it would be immaterial whether it did or not.

The will proceeds: "But in case no son of mine, begotten off the body of my wife, Anne Minchin, should live to inherit the aforesaid house and lands of Busherstown, or should leave any lawful issue, in such case I do bequeath the aforesaid lands of Busherstown to my eldest daughter, Elizabeth Agnes Minchin, begotten off the body of my wife Anne Minchin, for her sole and separate use and free from the control and debts of any husband with whom she may intermarry, and to go to my said daughter's male issue after her death, the elder to be preferred to the younger by seniority of years and priority of birth, and in default of male issue to her eldest daughter." That is, he gives the next estate to his eldest daughter for life, adding words which would probably enlarge that estate to an estate tail, and then he devises to his other daughter, Alice, in like manner. That is the whole of the disposition, except that in the event of his daughters dying without issue he leaves the lands "to any other child, I may have hereafter by my wife, Anne Minchin, to be born after the date of this will." Thus the ultimate remainder is limited only to any other child of the testator to be born after his will, and so the limitation leaves the testator's ultimate reminder in fee simple undisposed of in the very possible event of the exhaustion of the prior estates and there being no such after-born child.

The testator next devises his retrenched lands of Barnagrotty which he leaves in almost similar language, and subject to similar limitations, as he had already created in reference to Busherstown. Then he comes to deal with Rathnaviogue, and he disposes of those lands in the same way, except that he transposes the order in which the gifts over to his daughters are to take effect. Then comes a leasing power. The rest of the will contains a number of provisions, none of which seem to me to be of importance to the present question. The question is, Did the testator only mean to dispose of his ultimate remainder in fee under the marriage settlement, or did he mean to deal with lands which were, in fact, not his to deal with, having been already settled and placed out of his power, except by appointing them? If the latter be the true construction of the will, then a question of election arises.

In considering questions of election, there can be no doubt about the general rule of law. The Court must look at the whole scope of the will, with a view to see if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. In the present case, the plaintiff says you can give effect to the whole will as regards all the lands devised, because the limitations and estates provided for will take effect

M. R.
1895.
MINCHIN
v.
GARRETT.

by virtue of the ultimate remainder in fee which the testator was entitled to in the lands of Busherstown, and which he purported to dispose of, and with which the will must be taken as solely conversant. If that be the true construction, there is no case for election, because there is no conflict between the will and the settlement. But if the will, on its true construction, deals with an estate in the lands of Busherstown, subject only to the life interest of the testator's father, then a question of election does arise.

I was much pressed to adopt a different expression of the rule of law applicable to such cases. Mr. Campbell went so far as to say that if there is an interest vested in a testator to which the language of the will can *by possibility* apply, no case of election can arise. But that cannot be the rule, because if it were, hardly any question of election could ever have arisen where a testator had any interest of his own in the lands he dealt with; for, standing alone, the language, or part of the language, used in nearly every case, might *possibly* be applied to an estate actually vested in him. If the words of limitation here stood alone, I admit they might by possibility apply to the ultimate remainder in fee. But the question is, What was the intention of the testator? and that is to be gathered from the whole will, not by speculating, but by an honest endeavour to discover what the testator meant, seeing the language used and what it fairly means. No doubt, in approaching such a question, the Court must *prima facie* construe the words as applying to an estate which the testator had, if the words will fairly apply to it; nay, more than that, in order to raise a question of election, it must be clearly seen that the words used point to an estate which is not the testator's own but another's.

The case mainly relied on by counsel for plaintiff was *Rancliff* v. *Parkyns* (1), an appeal from a decision of Lord Eldon which came before himself in the House of Lords, and in which he himself, apparently sitting alone, or being the only law lord present, gave the judgment of the House. I quote from page 178 of the judgment:—"Now the utmost construction that can be given to this, *prima facie*, is that he means to dispose of such estates at Ruddington as were his own; and these were only the manor and the reversion. But although it appears *prima facie* that he meant to pass only what was his own, yet if the context shows that he means to propose a case of election and chooses to consider that which was not his own as his own, for the purposes which he had in view in making his will, the expression *my* manor, lands, &c., will not prevent a case of election from being raised. And all the cases from that of *Noys* v. *Mordaunt*, which is usually considered as the first, though I rather think it is not the first, case on the subject, to the present time, election amounts to this. If I choose to devise my real estate to the Noble Marquis opposite, I put it in this way because the illustration will make it more familiar; and in the same will I dispose of an estate which is not mine but his, a Court of Equity will say that he shall take no benefit from that will unless he makes good the whole of the will: and the Noble Marquis would not take therefore, unless he allows the whole of the will to be effectual, *i.e.* suffers his own to be disposed of according to the will or makes compensation for as much as he takes of mine. That is election. But, *prima facie*, it is not to be supposed that a testator disposes of that which is not his own. It must be by demonstration plain, by necessary implication, meaning by that the utter improbability that he could have meant otherwise, that the case is raised. But where there is that plain demonstration, that necessary implication, then you must give up all to pass according to the will or make compensation. But it rests upon those contending for a case of election to show that there is that manifest plain demonstration and utter improbability. So that the question comes to this, whether it is just reasoning in this case to say that there is that clear manifest declaration of intention which raises a case of election. Now it is unquestionable that if by these words describing the premises he intended to devise a present interest in the premises in which his first son Thomas had an estate tail, that amounts to a case of election." On this last passage in reference to the present case I lay stress. It is true that Lord Eldon does use the words "demonstration," "utter improbability"; he really means the same thing. In ascertaining what is the "demonstration" you

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(1) 6 Dow, 149.

M. R.
1895.
MINCHIN
v.
GABBETT.

must consider the probability and so ascertain what the man's intention was. The intention is what is to be looked at; and it must be gathered from the instrument itself. Even on the authority of this case—a very high authority no doubt—the question must be as to the plain intention of the testator and the "utter" improbability (which can mean no more than the *strong* improbability) of any other construction than that arrived at. This is all that the case implies.

Still, perhaps, the rule as laid down in *Rancliff* v. *Parkyns* (1) is stated too largely, if it is to be taken literally; and it must be taken to have been modified or explained by more recent decisions. Indeed there has been a change in many directions in the construction of wills since Lord Eldon's time. It used for instance to be held that a plain devise contained in a will could not be revoked by a gift in a codicil unless the words of revocation were *equally* plain with the words of devise. That doctrine is exploded. There is no necessity for equality of clearness, if it be clear that there is an intention to revoke. The rule is that you must see on the document what is the intention of the testator. There used to be a similar rule as regards the heir-at-law. He could not be disinherited without clear words of disherison. But it has been held that this rule does not mean anything more than that the will must express an intention of disinheriting him. And other instances might be given as to rules of construction, once regarded as canons, which have been altered by the tendency of more recent decision. The case of election is no exception to this tendency. In considering the question of election, the intention of the testator is the paramount consideration. No doubt if the Court is left in complete darkness or even in real doubt as to whether a testator meant his will to act on his own property or on property which was not his own, *prima facie* the rule would apply, that it must be shown, by those alleging it, that he meant to deal with property which was not his; nay, more, that a clear manifestation of intention to do so is required. But if this exists, it is enough, the question being as to the intention of the testator. That proposition is laid down in express terms in *Wintour* v.

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(1) 6 Dow, 149.

Clifton (1). There Lord Justice Knight Bruce gave rather a magisterial decision without going into the reasons for the conclusion he arrived at; but Lord Justice Turner delivered a closely reasoned judgment on the construction of the document before him. He says, "It was argued on their (the appellants') behalf that, upon the true construction of Sir R. Clifton's will, it affected his reversion only. That every testator must *prima facie* be taken to have intended to dispose only of the interest which he may have been entitled to dispose of. That there being property of Sir R. Clifton to answer every disposition of his will, the Court could not look beyond that property, and that where a testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made sufficiently clear to raise a case of election by anything short of positive declaration. To these two latter propositions I am not prepared to assent. I think that if the words of a will be such as to embrace different subjects, the context of the will may be resorted to for the purpose of ascertaining to which of these subjects the words were intended to apply; and I think that the question in every case upon the construction of a will must be, what was the intention of the testator, and that if the intention can be collected from the context, it is the duty of the Court to give effect to it as much as if it was in terms expressed, and not less so in cases of election than in other cases." Such is the principle laid down by the Lord Justice, and I entirely adopt it as a correct statement of the ground of judicial interpretation. He, however, does not fail to recognise the rule that, *prima facie*, a testator is to be taken as dealing only with what he had power to dispose of, and that in order to raise a case of election it must be clear that he had an intention of disposing of property which in fact did not belong to him.

It is unnecessary to go beyond the judgment of Lord Justice Knight Bruce and Lord Justice Turner; but the principle adopted in *Wintour* v. *Clifton* (1) is recognised in equally forcible language by Jessel, M.R., in *Pickersgill* v. *Rodger* (2).

The question therefore in this case is whether, taking the document as a whole, it is to be fairly construed as dealing with and disposing of an immediate interest (I use the word immediate without forgetting the outstanding life estate) which the testator had no power to devise, or as confined to an obscure ultimate remainder in fee over which no doubt he had control. The word "therefore" I have already referred to. I think it gives the reason of the devise "because I am entitled to dispose of the lands." "Will and bequeath" are (I admit) more apt to describe a gift of what was the testator's own, while the words of the recital are more apt to the exercise of a power of appointment.

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(1) 8 De G. M. & G. 641.

(2) 5 Ch. Div. 163.

Another matter was relied on also by counsel. In *Wintour* v. *Clifton* (1) the property in question was thrown into one mass and dealt with by the will as a whole; and it was argued that if it had been the intention of the testator in this case to devise the portion of property in question as an estate in fee-simple in possession, there would be strong reason to suppose that the will should operate upon all the property in the same way as upon one portion. After all, that only amounts to a distinction between the facts of this case and *Wintour* v. *Clifton* (1). In reference to the limitations as regards Barnagrotty which are similar to those concerning Busherstown, they are contained in a separate series: but they are parallel limitations contained in language practically identical with those of Busherstown. What reason there was for separating the limitations of the two estates (on the assumption that the testator was dealing with both as estates in possession) it is idle to speculate upon, but the identity of the language used in reference to the two properties presents a strong analogy to the case where property is thrown into one mass, because there is no distinction in the way in which the properties are dealt with by the will. If a man was dealing with the estate of Blackacre in possession and a reversionary interest in Whiteacre, it would be expected that he would notice the distinction in some way. Here the testator does what is most suggestive as showing that he intended to deal with both Busherstown and Barnagrotty as estates in possession, by expressly referring to the outstanding life estate of his father in the former. The argument presented is one worthy of consideration, but is incapable of convincing me that the testator intended only to deal with the ultimate remainder in fee in the one case, and an immediate interest in the other, seeing that the limitations which he creates are in each case practically identical.

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(1) 8 De G. M. & G. 641.

The defendants relied on the language of the gift as showing an intention to devise an immediate interest. The testator mentions the life estate of his father; he does not refer to the estate in tail male of his son.

I have already said that if he was dealing with his ultimate remainder in fee with an intention of preventing an intestacy as to it, it is a singular circumstance that he did not meet the case of his leaving no children.

But besides all this, and taken in connexion with it, another matter seems to me nearly conclusive on the case, treating it as a question of intention. I refer to the power of leasing. It is given to his executors, trustees, and any "children" in possession. What children? It is plain that he means his own children, and not remoter issue. Further, the leasing power is clearly intended to be an incident of the estate he thought he was disposing of: and the leasing power could only be exercised by one or more of his children when actually in possession of the estate by virtue of the interest limited by the will. But if the will only dealt with the ultimate reversion in fee, a child who was already seised of a prior estate in tail in possession (which must determine before he could be in possession under the will) could never be in possession under the will at all. It is obvious therefore that in conferring the power the testator supposed he was dealing not with a dim and distant reversion but with an estate *in presenti* which would, or at least might, vest in his child during his life. Assuming that he conceived that by the will he had already given to George John an immediate estate in fee, liable to be cut down in certain events, one can understand his object and meaning in giving him a leasing power, whereas there is no sense in it, if he was intending to deal with an ultimate remainder in fee, under which George John could never be in possession of the lands.

On the whole, I am of opinion that the plaintiff is bound to elect between his rights to the lands of Busherstown under the

settlement of 1842 and the benefit conferred on him by the will of John Minchin, subject to the ordinary rule as to making compensation should the election require it.

Solicitor for the plaintiff: *S. R. Bowles.*

Solicitors for the defendants, Welch: *Rooke & Company.*

R. W. L.

V.-C.
1895.
June 12, 13.
July 24.

ROCHFORT *v.* SEATON.

(1892. No. 329.)

Trustee and* cestui que trust—*Liability of trustee for trust-money lost by reason of defect in title—Solicitor employed—Unauthorised investment.

In the year 1838 the trustees of a marriage settlement invested portion of the trust funds on an assignment of an appointed share of a fund. The appointment purported to be made in execution of a joint power by a husband and wife, but the deed had not been executed by the wife. The trustees had employed a solicitor to act for them in preparing the assignment and to transact the legal business connected with it.

The trustees also invested portion of the trust funds on an assignment of judgments. The judgments had not been revived or redocketed, as required by 9 Geo. 4, c. 35. The power given to the trustees was confined by the settlement to an investment on real securities, and it contained a proviso that investments were to be made " without risk to the trustees ":—

Held, that the trustees were not liable for the loss occasioned by the non-execution of the power of appointment, but that they were liable for any loss occasioned by the unauthorised investment of the trust funds on the security of an assignment of judgments, they not being " real securities," and that the proviso, that the investments should be without risk to the trustees, only protected them while acting within the scope of their power.

Action to have the trusts of an indenture dated the 31st July, 1837, and made between John Staunton Rochfort of the first part, Horace Rochfort of the second part, Frances Cosby of the third part, the Right Honorable Thomas Henry Viscount Ferrard and Sir Mathew Blakiston of the fourth part, and the Right Honorable Ulysses Baron Downes and Sydney Cosby of the fifth part (being the settlement executed on the marriage of the said Horace Rochfort and Frances Cosby), so far as they relate to a sum of £4000, the fortune of the said Frances Cosby, thereby settled, so far as they were unperformed, carried into execution, and to ascertain what the investments of the said trust fund were, and whether the said fund, or any part thereof, had been lost or wrongly invested, and, if so, by whose default same occurred.

The plaintiff claimed that if it should appear that a breach of trust occurred during the joint lives of the said Ulysses, Baron Downes and Sydney Cosby, the original trustees of the said settlement, it might be declared that the defendants Reginald John Upton, Baron Seaton, as heir-at-law and administrator having assets of James, Baron Seaton, deceased, who was devisee and legatee under the will of the said Baron Downes, deceased, and the defendant Thomas Charles, Earl of Clonmell, as devisee and legatee under the will of the said Baron Downes, and as executor of Anne, Countess of Clonmell, deceased, who was devisee and legatee under the will of the said Baron Downes, and as devisee and executor of John Henry Reginald, Earl of Clonmell, deceased, who was devisee and legatee under the respective wills of the said Baron Downes and Countess of Clonmell, having assets, and the defendants Sir John Allen Johnson Walsh and James Gubbins, as trustees of the will of the said Sydney Cosby, deceased, having assets, should make good to the plaintiff such breach of trust.

The defendant Reginald John Upton, Baron Seaton, was sued as heir-at-law and administrator of James, Baron Seaton, deceased, who was a newly appointed trustee of the settlement of 31st July, 1837, and a devisee and legatee under the will of Ulysses, Baron Downes, deceased, an original trustee of the said settlement. The defendant the Earl of Clonmell, was sued as a devisee and legatee under the will of the said Ulysses, Baron Downes, and as executor of the Countess of Clonmell, deceased, who was a newly appointed trustee of the said settlement, and a devisee and legatee under the will of the said Baron Downes, and as devisee and executor of John Henry Reginald, Earl of Clonmell, deceased, who was a devisee and legatee under the respective wills of the said Baron Downes and Countess of Clonmell. The defendants Sir John Allen Johnson Walsh and James Gubbins, were sued as trustees of the will of Sydney Cosby, deceased, who was an original trustee of the said settlement. And the defendant John Burgh Rochfort, was sued as executor of the said Sydney Cosby.

By marriage settlement, dated the 31st July, 1837, executed on the marriage of Mr. Horace Rochfort, with Miss Cosby, certain trust funds were put in settlement. The trustees, Ulysses, Baron Downes, and Sydney Cosby, on the 12th June, 1838, invested £1200, portion of the trust funds upon an assignment of an appointed share of £6000, trust funds comprised in a marriage settlement of Sir Robert St. George, dated the 2nd April, 1807, which was vested in trustees to pay the income to Sir Robert and Lady St. George for their respective lives, and after their decease for the children of the marriage, as Sir Robert and Lady St. George should appoint. A deed, dated the 12th June, 1838, purporting to be an appointment by both Sir Robert and Lady St. George of £1200, part of the £6000, which recited the intention of both the donees of the power to appoint that sum to one of their children, James Cuffe St. George, was duly executed by Sir Robert St. George, and by the appointee, but not by Lady St. George, though a space was left for her name which was pencilled in. The assignment recited the deed as a joint appointment. The trustees of Mr Rochfort employed a solicitor to act for them in the ordinary course of business. It also appeared that a sum of £1950, part of the said sum of £6000, stood invested on assignments of judgments, entered before the year 1803, against Sir Robert St. George, which were not at the time of the investment of the £1200 docketed, revived, or redocketed, as required by 9 Geo. 4, c. 35. On the subsequent sale of Sir Robert St. George's estates in the Landed Estates Court, these judgments were held not to be incumbrances on his estate.

The power of investment given to the trustees of Mr. Rochfort's settlement authorized an investment only upon real security.

The representatives of Ulysses, Baron Downes, entered into a consent in the action by which they agreed to pay £600 in full satisfaction of their liability for any of the breaches of trust alleged.

V.-C.
1895.

ROCHFORT
v.
SEATON.

Serjeant Jellett, Q. C., *Matheson, Q. C.*, and *Leech*, for the plaintiff:—

The trustees are beyond all question liable for the loss of the trust fund. When they took an appointed share of a charge upon lands their first duty was to see that the security on which they lent existed. The appointee took nothing because there had been no joint exercise of the power of appointment. Though the defendants employed a solicitor they are not relieved from liability. *Speight* v. *Gaunt* (1) is quite unlike this case. It would be analogous if the transfer deed had not been executed or the scrip had not been signed by the Company. No technical knowledge is required to ascertain whether a deed has been executed or no. Ordinary prudence must be used: *Whiteley* v. *Learoyd* (2). Do the defendants contend that if the deed had not been executed by any of the parties the trustees would not be liable? So far as a trustee has the means of doing so, he should see that the transaction has been properly carried out: Lewin on Trusts, page 384. If under the best advice a trustee can procure he acts wrongly it is his misfortune, but public policy requires that he should be the person to suffer: *Re Knight's Trusts* (3); *Boulton* v. *Beard* (4). The case of *Andrews* v. *Weall* (5) is an authority for the plaintiff: there it was held that a trustee was bound to control the solicitor whom he has appointed, and to exercise his discretion in the matter. All the authorities both in England and Ireland hold that a trustee is liable for the negligence of a solicitor employed by him. There is no case the other way: *Bostock* v. *Floyer* (6); *Hopgood* v. *Parkin* (7); *Sutton* v. *Wilders* (8); *Doyle* v. *Blake* (9). The power of investment conferred on the trustees by the settlement was confined to investment on real securities. The investment of £1950 on assignments of judgments was not authorised by the settlement. Judgments are not real securities: *Johnston* v. *Lloyd* (10).

The judgments were not revived or redocketed, and in any event the trustees are liable for the loss occasioned by this omission.

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(1) 9 App. Cas. 1.
(2) 12 App. Cas. 727.
(3) 27 Beav. 45, at p. 49.
(4) 3 De G. M. & G. 608.
(5) 42 Ch. Div. 674.
(6) L. R. 1 Eq. 26.
(7) L. R. 11 Eq. 74.
(8) L. R. 12 Eq. 373.
(9) 2 Sch. & Lef. 231.
(10) 7 Ir. Eq. R. 252.

Gordon, Q.C., *Meredith*, Q.C., and *F. P. Hamilton*, for Sir John Allen Johnson Walsh and James Gubbins, trustees of the will of Sydney Cosby:—

The trustees are entitled to rely upon skilled persons in matters in which they cannot be expected to be experienced: *Whiteley* v. *Learoyd* (1). There the trustees were held liable because they had acted without making due inquiry. Is it to be said that the trustees should have got up the deed to see whether it had been duly executed by Lady St. George. A trustee cannot be held responsible for the intelligence or honesty of his agent: *Speight* v. *Gaunt* (2); *Andrews* v. *Weall* (3). In *Sutton* v. *Wilders* (4) the trustee employed the solicitor who was acting for the mortgagor. In *Knight's Trusts* (5) no legal difficulty arose, and the trustee should have exercised his own discretion. The same observation applies to *Doyle* v. *Blake* (6). *Hopgood* v. *Parkin* (7) has been dissented from wherever referred to. To give money to a solicitor to invest is a very different matter from employing him in investigating title. The trustees had a right to invest on real securities, and there is no allegation of bad faith on Sydney Cosby's part. After the long lapse of time evidence is not available; the transaction took place fifty-seven years ago. There is a proviso in the settlement that the trustees are to be liable only for funds which they should actually receive. The 22 & 23 Vict. c. 35 throws the *onus probandi* on those who seek to charge an executor or trustee with a loss arising from the default of an agent when the propriety of employing an agent has been established: Selborne, L. C., in *Brier* v. *Evison* (8).

The judgments were properly transferred and enrolled under Moore's Act (9 Geo. 4, c. 35). The money was lent in 1838. The matter of docketing and redocketing was one for the solicitor employed by the trustee, and the trustee could not be expected to know of or to inquire into legal technicalities of this nature.

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(1) 12 App. Cas. 727, at p. 731.

(2) 9 App. Cas. 1.

(3) 42 Ch. D. 674.

(4) L. R. 12 Eq. 373.

(5) 27 Beav. 45.

(6) 2 Sch. & Lef. 231, at p. 243.

(7) L. R. 11 Eq. 74.

(8) 26 Ch. D. 238, at p. 243.

Samuels, Q.C., and *Cherry*, appeared for John Burgh Rochfort, the personal representative of Lord Seaton, one of the trustees of the settlement whose estate had been administered in the Court of Chancery, and a decree for administration made.

[THE VICE-CHANCELLOR held that John Burgh Rochfort was not a necessary party, and awarded him costs against the plaintiff.]

THE VICE-CHANCELLOR :—

July 24.

The only question remaining to be decided in this action is whether the late trustees of the settlement on the marriage of Mr. Horace Rochfort with Miss Cosby, dated the 31st June, 1837, were liable to make good a sum of £1200, portion of the trust funds of that settlement. This sum they invested, so far back as the year 1838, upon an assignment of what purported to be the appointed share of Mr. James Cuffe St. George of a sum of £6000, which was a trust fund comprised in the marriage settlement of the late Sir Robert St. George, dated the 2nd April, 1807. By this latter settlement this sum of £6000 was vested in trustees in trust to pay the income to Sir Robert St. George and Lady St. George for their respective lives, and after their decease for the children of the marriage, as Sir Robert and Lady St. George should *jointly* by deed, or as the survivor should by deed or will appoint. James Cuffe St. George was one of the children of that marriage. A deed purporting to be an appointment to him by both Sir Robert and Lady St. George of the sum of £1200, part of the £6000, was prepared, and bore date the 12th June, 1838, which recited the intention of both the donees of the power to appoint that sum to him, and then proceeded in due and regular form to make the appointment in strict accordance with the power. It was duly executed by Sir Robert and by the appointee, and a place at the foot of the engrossed deed was left between their signatures for the signature of Lady St. George, and her name was pencilled in by the solicitor to show where she was to write her name. By some strange and inexplicable mistake she did not then, or at any time, sign the deed. Everyone connected with the transaction, or who could give any explanation of it, appears to be long since dead. From this omission, the appointment was invalid and inoperative. The same solicitor appears to have acted for the respective parties. This appointment formed part of the transaction for the advance to Mr. James C. St. George of the sum of £1200 by the trustees of Mr. Rochfort's settlement, which was carried out by an assignment of the same date to them by him of the share of the other trust sums supposed to have been so appointed to him. Upon this the £1200 was paid.

There can be no doubt that by reason of the non-execution of the appointment by Lady St. George, the money was improperly advanced, and that this constituted a breach of trust by the Rochfort trustees. But the main question is whether they are liable to make good any loss thereby occasioned. There is not, in my opinion, any proof of personal default on the part of the trustees in this part of the transaction. Assuming that the £6000, out of which this £1200 was intended to be appointed, was at the time in a proper state of investment, the agreement between them and James C. St. George was not open to objection. They proceeded on the basis of a regular appointment to him by Sir Robert and Lady St. George, and an assignment of the appointed sum to them. Both the deeds were properly prepared and engrossed for execution. The appointment was in due form, and was expressed to be a joint appointment. The cotemporaneous deed recites it as a joint appointment, and as executed, as it was plainly intended to be, by both the donees. I have no doubt that the omission was accidental.

In all this transaction the trustees employed a solicitor to act for them in the ordinary course of business, and it would have been in the ordinary course of business to entrust that solicitor with the money to be paid on the due execution of the deeds. It was not incumbent on them to attend in person and see the deeds executed, and themselves to hand the money to the assignor. It has not been suggested that the solicitor was unfit or incompetent, and the fact of his being a solicitor, duly qualified as such, was all that they had to see to. No one can be required, at least in ordinary circumstances, to examine into the capabilities of the professional person whom he employs. This proposition was recognised by Kekewich, J., in *Andrews* v. *Weall* (1) when he says, "A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties."

In the present case it was necessary in the ordinary course of business for the trustees to employ a solicitor. The protection thus afforded to trustees was most carefully considered, and the law on the subject clearly expounded both by the Court of Appeal and afterwards by the House of Lords in the leading case of *Speight* v. *Gaunt* (2). The principles there stated are 1st, that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own business; 2nd, that though a trustee cannot delegate his trust, yet he is justified in employing qualified persons as agents when in so doing he follows the ordinary course of business of a like nature; and, 3rdly, that when according to the usual and regular course of such business moneys payable or receivable ought to pass through the hands of such agents, this course may be properly followed by trustees, though the moneys are trust moneys; and, 4thly, that if under such circumstances, and without any misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. These propositions include, in my opinion, all special agencies such as brokers or solicitors.

It was not contended, nor could it be properly contended, that it is not according to the ordinary course of business, like that with which I am now concerned, for ordinary persons to employ a solicitor to transact such business. It is indeed an actual necessity for most persons to do so. I am also of opinion that according to the usual and regular course of such business the money to be paid as the consideration for the purchase is entrusted to the solicitor to be paid by him to the person entitled on the completion of the conveyance. Lord Blackburn in *Speight* v. *Gaunt* (2) instances a transaction of purchase and sale when the vendor is entitled to keep his hold on the property till he receives the money, and the purchaser is entitled to keep his money till he gets the property; and says that it would be in all cases inconvenient if the vendor and the purchaser were required to meet and personally exchange the one for the other, and that when the parties are living remote from each other it would be physically impossible. He treated such a case as within the ordinary principle.

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(1) 42 Ch. Div. 674, at p. 678.

(2) 9 App. Cas. 1.

I am of opinion on this branch of the case that the trustees were not liable for any loss sustained by reason of the invalidity of the appointment.

The plaintiff seeks to hold the trustees liable for another breach of trust in investing the £1200 in securities not authorized by their power. He submits first that an investment on the security of judgments was not a real security, and therefore not within the investments authorized by the Rochfort settlement, namely, public or private *real* security; and secondly that the judgments on which the £6000 was lent were not docketed, revived, or redocketed under the Acts. The facts as to this are that the £6000 was invested to the extent of £1950 on assignments of judgments entered before the year 1803 against Sir Robert B. St. George, and supposed to be incumbrances on his estates. But as they were entered more than twenty years before the Act of 9 Geo. 4 (Moore's Act), and not docketed within five years after the Act, they ceased to be charges on the estates. These estates were afterwards sold in the Landed Estates Court, and on the settlement of the schedule of incumbrances these judgments were disallowed, and the purchase money paid out irrespective of them. This sum of £1950 was therefore lost to the trust funds of the St. George settlement. There were two valid appointments out of the £6000 prior to that to James Cuffe St. George which were paid in full, and there remained a sum insufficient for payment in full of the £1200, purported to be appointed to James C. St. George, if it had been a valid appointment, but as it was void, this sum was paid to an appointee puisne to that intended to be made to James C. St. George. These matters were all the subject of adjudication in the cause petition matter of *Johnson* v. *Caulfield* (1) in which a final decretal order was made on the

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(1) Not reported.

9th February 1869. The funds dealt with in that matter were the portion of the proceeds of the sales of the St. George estates, applicable to payment of two old family charges, on assignments of which portions of the £6000 Irish, amounting to £3200 Irish, had been lent by the trustees of the St. George settlement; and a sum which was realized on foot of a policy of insurance on the life of Sir Robert St. George on which the same trustees had lent the residue of the £6000.

A power such as that in the Rochfort settlement which authorized an investment only upon real security did not include a loan upon judgments affecting real estate, as held by Sir E. Sugden, L.C., in *Johnston* v. *Lloyd* (1). The intended investment in the assignment of a portion of a charge which itself consisted to the extent of the £1950 Irish, of moneys due on foot of judgments against Sir R. St. George, was so far an improper and unauthorized investment. I do not think that this breach of trust is open to the same considerations as that in reference to the non-execution of the deed of appointment, for it is in respect of a matter which the trustees were bound to decide for themselves, and should not have delegated, even if they did so, to their solicitor or any third person. It was their duty to see for themselves that the proposed security was such as they were authorized to invest upon. They are not, in my opinion, relieved from liability for breach of this duty by the words, "but without risk to them or either of them," in the power of investment, as these words could only protect them when acting in the discharge of their duty to invest in real security. I must therefore hold that they were guilty of a breach of trust in this investment.

But a further objection was made by the plaintiff to this particular investment, as it appears that these judgments were not docketed, revived, or redocketed, and therefore were absolutely void as against subsequent purchasers, and they were dealt with in the matter of St. George's estate as non-existing charges. This would in itself be a very serious ground of charge against the trustees, as it was undoubtedly a breach of trust to lend on a security consisting of judgments, even if investment upon judgments were authorized by the power, without ascertaining that they had been duly revived or redocketed. It is not necessary for me to decide whether the trustees could protect themselves from liability on this head by the fact of their having duly employed a solicitor, whose duty it was to look into all these legal matters, as I hold that the investment was in its nature unauthorized.

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(1) 7 Ir. Eq. R. 252.

The extent of the liability of the trustees must be the subject of inquiry at Chambers, and must, I think, proceed on the basis of exemption from the loss which would have been occasioned by the non-execution of the appointment by Lady St. George, but of liability for the loss sustained by reason of the investment in the unauthorized security of the share of the £6000. That there has been a loss is undisputed; that this loss was occasioned by a breach of trust by the Rochfort trustees I have now decided; that the breach of trust was twofold, first, in agreeing to invest this trust money and paying it over upon what was not a proper security, and secondly, in paying this trust money to the appointee without having the appointment to him duly executed. There is some difficulty in arriving at a conclusion as to the effect of all this upon the liability of the trustees, for if they are exempted from liability, as I have held them to be in reference to the non-execution of the appointment, it may be urged that it follows that there has been no loss sustained by the improper investment on unauthorized security, and that therefore they should be exempt from liability altogether. But this would be to allow trustees to take advantage of their own wrong, and to escape from liability for their error in contracting for the unauthorized investment by the subsequent neglect of their agent to have the proposed security, such as it was, perfected before paying over the trust money.

The conclusion at which I have arrived is that the trustees were liable to make good the loss to the *cestui que* trust occasioned by the wrongful investment, as distinguished from the defective appointment.

The representatives of Lord Downes, one of the trustees, have entered into a consent in this action by which they agreed to pay a sum of £600 on foot of the breaches of trust I have been dealing with, which by the terms of the consent is to be in full satisfaction of their liability on foot of this transaction, and which sum must be credited against any amount which shall be found to be chargeable against the assets of the defaulting trustees.

There were two other breaches of trust charged in the plaintiff's claim which occurred after the death of Mr. Cosby, and for which, consequently, the assets of Lord Downes alone are liable, but these form the subject of the consent which I have mentioned, and no question, therefore, arises as to them.

Solicitors for the plaintiff: *Wm. Fry & Son.*

Solicitors for the defendants Sir John Allen Walsh and James Gubbins: *Meade & Richardson.*

Solicitor for the defendant John Burgh Rochfort: *T. F. Irwin.*

T. H. M.

In the MATTER of THE LOUGH NEAGH SHIP COMPANY, Limited; Ex parte HENRY THOMPSON.

M. R.
1895.
Jan. 21, 22.

Company—Liquidator—"Secured creditor"—Equitable execution—Order appointing receiver over ship—Judicature (Ireland) Act, 1877, *sect.* 28 (1)—*Bankruptcy (Ireland) Amendment Act,* 1872, *sect.* 4—*Companies Act,* 1862, *sect.* 163.

A judgment creditor of a limited Company obtained an order appointing him receiver over the beneficial interest of the Company in a ship, subject to incumbrances. The creditor took no further step to enforce payment, and a winding-up order was made:—

Held, that the receivership order did not make the judgment creditor a secured creditor of the Company.

The expression "secured creditor," in sect. 28 (1) of the Judicature (Ireland) Act, 1877, has the same meaning as regards a Company in liquidation as it has under the Bankruptcy (Ireland) Amendment Act, 1872, sect. 4, namely, "a creditor holding a mortgage, charge, or lien on the debtor's estate as security for a debt due to him."

Summons.

This was an application by way of summons on behalf of Henry Thompson, that he be declared, by virtue of an order, dated the 2nd November, 1893, of the Queen's Bench Division, appointing him receiver by way of equitable execution over the interest of the Lough Neagh Ship Company (Limited) to the extent of a judgment debt of £355 17*s.* 8*d.*, recovered by him on the 5th September, 1893, to be a secured creditor of the Company in respect of the said judgment debt of £355 17*s.* 8*d.* with interest thereon at 4 per cent. per annum from the date thereof, together with £2 2*s.* costs of the said order of 2nd November, 1893, and also the costs incurred by the applicant in an action in the Chancery Division (Vice-Chancellor), between the Lough Neagh Ship Company and Henry Thompson, plaintiffs, and John Workman, defendant, and also that out of the proceeds of the estate of the ship "Lough Neagh," when sold, the liquidator do pay to the applicant the judgment and costs aforesaid in priority to the debts of the other creditors of the Company.

The order of the 2nd November, 1893, referred to in the summons, after reciting the judgment therein mentioned, and that the Lough Neagh Ship Company was possessed of a ship called "The Lough Neagh," subject however to certain mortgages, it was ordered that the plaintiff be appointed receiver without fee or salary, by way of equitable execution, over the defendants' beneficial interest in the said ship, named "The Lough Neagh," to the extent of the plaintiff's judgment debt, and subject to existing valid incumbrances, upon entering into security before the Master of the Division in such amount and mode as should satisfy the said Master, and that the plaintiff should have £2 2*s.* for the costs of the said motion. After the making of the said receiver order, the ship was advertised for sale by John Workman, the mortgagee of the ship, but proceedings were taken by the said Henry Thompson in the Chancery Division to set aside the said mortgage, and to restrain the sale, and an order was made by the Vice-Chancellor, on the 25th November, 1893, restraining the sale.

On the 15th December, 1893, a winding-up order was made by the Master of the Rolls, and a liquidator appointed, and the proproceedings in the Vice-Chancellor's Court were consolidated with the winding-up proceedings. A copy of the order of the 2nd November, 1893, was served upon the liquidator, with an intimation that the said Henry Thompson claimed to be a secured creditor of the Company. The ship was afterwards sold.

A. F. Blood, in support of the summons:—

It is submitted that the receiver order made the applicant a secured creditor of the Company. The Companies Acts contain no definition of secured creditor, but section 163 of the Act of 1862 provides that "where any Company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate and effects of the Company after the commencement of the winding-up shall be void to all intents." That implies that an execution put in force before the winding-up would be valid.

[THE MASTER OF THE ROLLS: In Buckley on Companies, page 374, it is stated in the note to section 163 that "execution put in force" means by entry of the sheriff.]

The order here is as good as entry by the sheriff; it is the same as if the ship had been taken in execution: *Anglo-Italian Bank* v. *Davies* (1); *Ex parte Evans* (2). The provision in section 28 (1) of the Judicature (Ireland) Act, 1877, that in a winding-up the same rules shall prevail as to the respective rights of secured and unsecured creditors as may be in force for the time being in bankruptcy, does not import into the case the definition of secured creditor in sect. 4 of the Bankruptcy (Ireland) Amendment Act, 1872, nor the rules in bankruptcy as to the rights of a secured creditor: *In re Withernsea Brickworks* (3); *In re Richards & Co.* (4); *In re Maggi* (5); *Gorridge* v. *Irwell India Rubber and Gutta Percha Works* (6). In *Blackman* v. *Fysh* (7) it was held that the appointment of a receiver over rents at the instance of a judgment creditor was a "taking in execution by process of law" on the happening of which the life estate of the debtor under a settlement determined. In *Levasseur* v. *Mason and Barry* (8) it was decided that the effect of a receiver order obtained by a judgment creditor over the property

(1) 9 Ch. D. 275.
(2) 13 Ch. D. 252.
(3) 16 Ch. D. 337.
(4) 11 Ch. D. 676.
(5) 20 Ch. D. 545.
(6) 34 Ch. D. 129.
(7) [1892] 3 Ch. 209.
(8) [1891] 2 Q. B. 73.

of a foreign Company which afterwards went into liquidation was to give the judgment creditor priority over the liquidator.

Jefferson, for the liquidator :—

The rules of bankruptcy apply since the passing of the Judicature (Ireland) Act, 1877, section 28 (1). A receiver order does not make the party obtaining it a secured creditor in the event of the bankruptcy of the debtor : *In re J. O'Neill* (1) ; *In re Dickinson* (2) ; *In re Potts* (3), in which *Levasseur's Case* (4) is explained : Annual Practice, 1895, p. 905.

Blood, in reply :—

Levasseur's Case (4) is in point. The cases cited are bankruptcy cases. In *In re Dickinson* (2) the order did not direct payment ; here the order inferentially authorises payment. In *In re Potts* (3) the receiver was not over property in the possession of the debtor, but in the hands of trustees, which made all the difference.

July 24.

THE MASTER OF THE ROLLS :—

I am of opinion that the applicant here, Henry Thompson, has no mortgage charge or lien upon the ship "Lough Neagh." The ship was the property of a limited liability Company, and this Company was indebted to Thompson in a sum of money, which resulted in a judgment of the Queen's Bench Division, obtained by him against the Company, on the 5th September, 1893, for £348, and for interest thereon, together with £5 11*s*. for costs, making together the sum of £355 17*s*. 8d. Having obtained this judgment, Thompson applied for and obtained an order of the 2nd November, 1893, whereby he was appointed receiver, by way of equitable execution, over the beneficial interest of the said Lough Neagh Ship Company (Limited) in the ship "Lough Neagh" to the extent of the said Henry Thompson's said judgment debt, and subject to existing valid incumbrances, upon entering into security before the Master. The order was directed to be served on John Workman, and Workman, Clark, & Company, of Belfast, who were stated to be mortgagees of the ship. John Workman claimed to be a mortgagee for £7500. This order was obtained *ex parte*, and without notice to anyone, and was absolute in the first instance.

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(1) 21 L. R. Ir. 211.
(2) 22 Q. B. D. 187.
(3) [1893] 1 Q. B. 648.
(4) [1891] 2 Q. B. 73.

Bowen, L. J., in the recent case of *In re Potts* (1), says that it is improper that such an order should be made *ex parte*; that may be so as a general rule, but there are cases where it may be necessary to proceed *ex parte*, as, for example, where the property might be disposed of in the meantime if notice was given of the application. I do not think that Bowen, L.J., meant to lay down an absolute rule; indeed he qualifies it by saying: "when there is really no danger to the property, nor any of the circumstances under which such orders used to be made *ex parte* in the Court of Chancery."

However, the order was, as I have said, *ex parte*, and an absolute order; but it was of course open to the parties affected by it to move to discharge it. This they did not do. Thompson went before the Master of the Queen's Bench Division, and perfected his security as receiver pursuant to the order, but beyond this he did nothing till after the liquidation. The ship was at Cork at the time, and there was jurisdiction to seize it under an order of the Admiralty Court, or possibly by proceedings taken under the order of the Queen's Bench Division. Whatever rights were conferred by that order, they were not made use of before the liquidation.

It is contended that the effect of the order was to create something in the nature of a mortgage charge or lien on the ship, and to put Thompson in the position of a secured creditor within the meaning of the Judicature Act. The ship has since been sold, and the proceeds are about to be distributed, and the claim here is that payment should be made to the applicants in priority to the other debts of the Company. There is no specific enactment in the Companies' Acts as to the rights of a "secured creditor," but there is a provision of a negative character in section 163 of the Companies' Act of 1862, which does not define in any way the position of a secured creditor, but takes away certain rights of

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(1) [1893] 1 Q. B. 662.

M. R.
1895.
In re Lough Neagh Ship Company; *Ex parte* Thompson.

creditors after the liquidation. It provides "where any Company is being wound-up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the Company after the commencement of the winding-up shall be void to all intents." This section cannot apply here, as there has been no execution put in force against the Company; but it is suggested that the converse of what is stated in the section must be the case: that is to say, that an execution which is executed before the commencement of the winding-up is valid. There could not of course be an express enactment to that effect, as it would sanction an execution which could be set aside, *e.g.* on the ground of fraud. The Bankruptcy Act levels executions if bankruptcy supervenes within a certain time after seizure and sale by the sheriff; it is a special and artificial code. There is no power under the ordinary law to put an end to an execution once it has been levied. If the sheriff has entered and seized the goods of a debtor, the Court cannot interfere with the rights of the execution creditor. I mention this to show that the Companies' Act of 1862 does not by sect. 163, nor by sect. 87, affect the question in any way. If Thompson, who had obtained a valid order, had followed it up before the liquidation by seizure of the ship, or attaching it by legal process, or had got possession of it and sold it, he could not have been deprived of the rights he had gained thereby. But he has done nothing under his order, and he can have no rights unless they are conferred by sect. 28 of the Judicature Act. Sub-sect. 1 provides that "in the winding-up of any Company under the Companies' Acts, 1862 and 1867, whose assets may prove to be insufficient for payment of its debts and liabilities, and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt in Ireland." Is Thompson a secured creditor within the meaning of this section? We are to some extent left in the dark as to what "secured creditor" here means, as there is no definition of it. The section does not go on to say that for the purposes of this section the expression "secured creditor" shall have the same

M. R.
1895.

In re LOUGH NEAGH SHIP COMPANY; *Ex parte* THOMPSON.

meaning as in the Bankruptcy (Ireland) Act, 1872. But can it have any different meaning? In my opinion the immediate context requires, in the absence of any words to the contrary, that the definition of secured creditor in the Bankruptcy Act should be read into this section of the Judicature Act. As I understood Mr. Blood's argument, a great part of it was addressed to the difference between the Bankruptcy Act and the Judicature Act. The cases to which he has referred do not suggest any other distinction. Until the contrary is decided by a higher tribunal, and it is laid down what a secured creditor is, I hold that it has the same meaning in this section of the Judicature Act as it has in the Irish Bankruptcy Act, 1872, where the definition is identical with that in the English Bankruptcy Act, 1883.

The question is, then, has Thompson here a mortgage, charge, or lien? Mortgage he certainly has not; a charge the order does not profess to give him. Has he a lien? He certainly has not a possessory lien, for he did no act which could be considered equivalent to taking possession. But there are other liens known to the law which are not possessory; for example, an unpaid vendor may have a lien, though he has parted with possession of the estate; or a shipowner may have a lien for freight, though he has landed the cargo and warehoused it, being given a lien by statute; and there are many other instances of liens non-possessory. Here there is no such lien. In my opinion the order gave Thompson nothing but a right to act in reference to the ship.

It is said that it is an execution. It purports to be an equitable execution. The ship had been mortgaged; so it was impossible for the sheriff to seize it under a writ of *fi. fa.* The order is nothing more than a declaration that the plaintiff is a creditor for the amount named in it, and that he is entitled to be paid that amount out of the property of the defendant over which he is, by the Court, appointed receiver, and that he is entitled to proceed to receive this amount out of that property. If he had acted on the order and got possession, he could not have been deprived of the fruits of his equitable execution. But as it is, he cannot be in a better position than if he had placed a writ of *fi. fa.*

M. R.
1895.

In re LOUGH NEAGH SHIP COMPANY; *Ex parte* THOMPSON.

in the hands of the sheriff, but the writ had not been executed: see *London and Devon Biscuit Company* (1).

Mr. Blood relied mainly on the case of *Levasseur* v. *Mason and Barry* (2), which at first sight appeared to be in his favour, but it is clear, when considered that it is no authority in support of his contention. The facts of that case were as follows:—The plaintiffs were the liquidators of a French Company, which had purchased from the defendants, Mason and Barry, Limited, a cargo of copper. Mason and Barry obtained judgment in England against the French Company for £42,000. The copper was at the date of the judgment in the hands of the Tharsis Sulphur and Copper Company at Newcastle-on-Tyne, to whom it had been delivered by the French Company for smelting, and the Tharsis Company was entitled to a lien upon it for the cost of smelting. Any execution would have been defeated by the claim of the Tharsis Company. Mason and Barry obtained *ex parte* an order appointing a receiver over the copper in question in the possession of the Tharsis Company. The order provided that the appointment was to operate at once, and to be without prejudice to the rights of any prior incumbrancers upon the goods, or if any prior incumbrancer was in possession, then without prejudice to such possession, and that the receiver should pass his accounts, and pay the balance appearing due on the accounts, or such part thereof as should be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what should be due in respect of the judgment obtained by the defendants, and that the balance, if any, should be paid into Court. This order was afterwards varied by the Divisional Court, by directing that the receiver should not pay out anything received under it, without the direction of the Court. This was in consequence of the French Company having been adjudicated by the Tribunal of Commerce of the Seine at Paris to be in judicial liquidation. The liquidators sought to get rid of the receiver order, and to put Mason and Barry on the footing of ordinary creditors. An order was made at Chambers that the Tharsis Company be at liberty to sell so much of the copper as might be necessary to cover their claim, and that the receiver be at liberty to sell the residue at his discretion, without prejudice to the rights of the liquidators. The copper was sold accordingly, and the proceeds, after deducting the amount due to the Tharsis Company, and the receiver's costs and charges, were paid into Court, to abide the result of the trial of the question, whether the liquidators, or Mason and Barry, were entitled to the balance. At the trial before Day, J., evidence was given as to the French law, which however he discredited, and the case proceeded on the basis that the liquidators were only assignees of the property of the Company, subject to existing rights and equities. There was no liquidation according to English law, and no proceedings in Court, so that section 28 of the Judicature Act could not apply. The Court of Appeal held that Levasseur merely took the place of the French Company, and affirmed the decision of Day, J., in favour of Mason and Barry.

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(1) L. R. 12 Eq. 190.

(2) [1891] 2 Q. B. 73.

Lord Coleridge, in giving judgment, said—"In this case the question before us is, in my opinion, to be determined by English law alone. The receivership order must be taken to have been an ascertainment or decision by the Court that, at the date upon which the order was made, the present defendants in the issue were entitled to the money in respect of which it was to operate. It was an order to pay, though it was afterwards varied by the Divisional Court, whose decision was affirmed by this Court. Now a receivership order has been called a step or process of equitable execution. Using language which, to my mind, is plainer and less likely to mislead, I should say that it is an order which shows that, in the judgment of the Court, the person obtaining it would be entitled to execution, but that from some legal impediment execution cannot be had. It ascertains that, but for that legal impediment, the person who obtains it would be entitled to the money or subject-matter upon which the order is to operate. Here the receivership order was made before the liquidation in France took place. The present defendants, who obtained the order, could not have execution upon their judgment, because the property upon which the order operated was in the hands of persons who had a lien upon it. The property itself, therefore, could not be taken in execution; but the right to get execution upon it, when all legal impediments were removed, was ascertained by the

M. R.
1895.
In re LOUGH NEAGH SHIP COMPANY; *Ex parte* THOMPSON.

receivership order. The liquidation in France took place within ten days from the making of the receivership order. If no question with respect to the liquidation in France had arisen, it is perfectly clear that the receiving order, on the lien being discharged by payment, would operate, and the present defendants would have been entitled to execution, and the proceeds of execution, upon the copper which was made the subject-matter of the execution. If so, it follows that, at the date of the receivership order, the present defendants had a right to execution upon the copper, subject to the legal impediment of the Tharsis Company's lien. When the lien was paid off, the legal impediment was removed. The defendants' rights to the copper is ascertained to have been complete at the date of the receivership order, and it follows that the judgment of Day, J., must be affirmed." Lord Esher and Fry, L.J., gave judgment to the same effect.

That case does not touch the present at all. There was no question of secured creditor or of bankruptcy there. It does not establish the proposition that a receiver order *per se* creates a lien on the property of a company in liquidation under the Companies' Acts, for there was no such liquidation in the case.

The other two cases which were cited are conclusive that in bankruptcy an order of this kind does not create a lien. The first of those cases is *Re Dickinson* (1). There Charrington and Company recovered judgment against Dickinson, and the judgment creditors obtained an order, on the 7th December, 1887, appointing one of them receiver over the property of the defendant, without prejudice to the rights of any prior incumbrancer. The goods remained in the possession of the receiver until the 13th January, 1888; a receiving order in bankruptcy was made against Dickinson, and he was adjudicated a bankrupt. Cave, J., held that the judgment creditors had obtained nothing more than equitable execution against the goods of the debtor; that sect. 45 of the Bankruptcy Act, 1883, applied to such an execution; and that, the execution not having been completed by sale before the date of the receiving order, the judgment creditors could not retain the benefit of it against the trustee in bankruptcy. That judgment was affirmed by the Court of Appeal. Lord Esher there says: "It is not pretended that the order appointing the receiver gave the appellants any mortgage or charge on the property of the debtor; but it is said that by means of the receiver they hold a lien upon the property of the debtor which he received as a security for their debt. How can the possession of a receiver establish a lien in favour of the creditor at whose instance he was appointed? Does the receiver hold the goods so as to give the creditor the possession of them? He holds the goods as agent for the Court, not for the creditor. There cannot, therefore, be a possessory lien of the creditor. Is there any other lien? In my opinion the receiver appointed under such an order does not hold the goods for the creditor at all: he holds them for the Court in order that it may decide the right to them. I think the case does not come within sub-sect. 2 at all, for the appellants have neither mortgage, charge, nor lien upon any part of the property of the debtor." Fry, L.J., gave judgment to the same effect.

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(1) 22 Q. B. Div. 187.

The other case is *Re Potts* (1). Bowen, L.J., there says: "But to what does it amount, if it is good? It seems to me that it does not amount to the creation of an equitable interest in the nature of a charge on the fund. It falls short of that. It is a mere direction to the receiver to pay money, and to pay it over to the creditors when he does receive it. There is nothing to create an interest in the fund, nor could such interest, as it seems to me, be created by a Judge at Chambers in this way."

The order there provided that the receiver (who was appointed over the share of the defendant in the residuary estate of his mother) should pay the balance of the sums received in satisfaction of the judgment debt.

Even if the order here contained a direction by the receiver to pay the creditors, there is nothing to show that the receiver did anything. Though he might have seized and sold and received the proceeds, he has not done so.

It is to my mind clear that this order did not give the creditor a charge or lien on the ship. The expression "secured creditor" has, in my opinion, the same meaning as regards a company in liquidation under the Companies' Acts as it has under the Bankruptcy Acts. I am therefore of opinion that this application must be refused. Although I decide the case on the ground I have just mentioned, I may add that I do not see that the words "secured creditor" are susceptible of any wider or different meaning than that which they have in the Bankruptcy Acts, namely, "a person holding a mortgage, charge, or lien on the property of the debtor."

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(1) [1893] 1 Q. B. 648.

Solicitors for Henry Thompson: *D. & T. Fitzgerald.*
Solicitors for the liquidator: *L'Estrange & Brett.*

W. L.

M. R.
1895.
March 4.

IN THE MATTER OF SAWYER'S TRUSTS, AND IN THE MATTER OF THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

(1895. No. 121.)

Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *section* 39—*Married woman—Restraint on anticipation—Order binding her interest in fund appointed to son with her consent.*

Restraint on anticipation of personalty settled by a married woman on herself for life, with remainder to her husband for life, was removed, so as to allow a sum of £500, which she and her husband had appointed to their son, the only child of the marriage, free from his contingent life interest, but subject to her life interest, to be raised by the trustees of the settlement, and expended in buying cattle and implements of husbandry for the purpose of starting the son as a practical farmer, and relieving the husband and wife of the expense of maintaining him.

SUMMONS.

This was an application on behalf of Elizabeth Sawyer, wife of Manfred John Sawyer, for an order that, notwithstanding the applicant was restrained from anticipating her interest under the settlement dated November 11th, 1873, executed on her marriage with the said Manfred John Sawyer, the sum of £500, part of the funds subject to the trusts of the said settlement, and appointed to Edmond Wilder John Sawyer, the only child of the marriage, by deed poll, dated February .6th, 1895, might be raised and applied by Robert W. M'G. Martin and Thomas Huddlestone, the trustees of the said settlement, for the purpose of purchasing live stock and implements of husbandry for the said Edmond Wilder John Sawyer, and for the costs of the application to be paid out of the trust funds comprised in the said settlement.

It appeared from the affidavit of the applicant that on the occasion of her marriage to her present husband in November, 1873, she put in settlement a mortgage debt of £3155 and a bond to secure £5000. The income of the trust funds, which at the time of the application consisted of the mortgage debt and of a sum of £4000 India 3 per Cent. Stock, being the proceeds of the amount received on foot of the said bond, was payable to the applicant during her life for her sole and separate use free from the control of the said M. J. Sawyer, and so that she should not have power to dispose thereof in the way of anticipation, and after her death to the said M. J. Sawyer for life, and after the death of the survivor the trust funds were settled upon the usual trusts for the issue of the marriage. There was only one child issue of the said marriage, namely, the said Edmond Wilder John Sawyer, who was born in October, 1874, and would not attain twenty-one years of age till October, 1895.

The applicant was forty-nine years of age; her husband was fifty years of age, and was a retired officer in the army with a pension of about £290 a-year. This, besides the income of the trust funds, which amounted to about £274, was their only means of support. The applicant in the event of her surviving her husband, would be entitled to a Government annuity of £70 a-year.

Edmond Wilder John Sawyer, the son, had been for the past four years apprenticed to a practical farmer in England, and intended to make farming his profession, having been strongly recommended by his medical advisers to adopt an outdoor life, and the applicant and her husband had during the said period

M. R.
1895.

In re
SAWYER'S
TRUSTS.

expended out of their own income an annual sum of £120 for the purpose of having their son trained as a practical farmer. He had acquired considerable practical experience and knowledge of his profession, and the applicant desired that he should as soon as possible be in a position to start in his profession both for his own sake, and more especially that she might be relieved from the large annual expenditure incurred on his behalf. With that view the applicant and her husband had recently left England, and had taken on lease the house and lands of Oakmount, Tuam, county Galway, containing 71 Irish acres, where the applicant intended that her son should live with her and her husband and set up as a practical farmer. In order to enable him to make a good start at his profession it was, in her opinion, absolutely necessary that a sum of at least £500 should be provided for the purchase of live stock and implements of husbandry. The trust funds were the only source from which this money could be provided, and with a view thereto the applicant and her husband by deed poll dated February 6th, 1895, in consideration of the power given to them by the said settlement irrevocably appointed the sum of £500, portion of the said trust-funds, to their son the said Edmond Wilder John Sawyer, freed from the contingent life interest therein of her husband, but subject to her own life interest. Under these circumstances the applicant submitted that it would be for her benefit to forego the interest on £500, which amounted only to about £15 per annum, and thus be relieved from having to contribute to the said annual outlay of £120 a-year for the support of her son.

Serjeant Jellett, Q.C., in support of the application.

W. M. Jellett, for the trustees of the settlement.

The following cases were relied on: *Re Wood* (1); *Re Little* (2); *Re Segrave* (3); *Re Wright* (4); *Re Flood* (5); *Re Milner* (6); *Hodges* v. *Hodges* (7); *Millner's Estate* (8).

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(1) 29 Solr. J. 183.
(2) 40 Ch. D. 418.
(3) 17 L. R. Ir. 373.
(4) 15 L. R. Ir. 331.
(5) 11 L. R. Ir. 355.
(6) [1891] 3 Ch. 547.
(7) 20 Ch. Div. 749.
(8) L. R. 14 Eq. 245.

The Master of the Rolls:—

I am of opinion that this is a proper case for making the order asked for. Mrs. Sawyer has already expended a large sum upon the education of her son, with the object of enabling him to commence life as a farmer. Whether practical farming in Ireland is likely to be a profitable business I do not know, but the parties here *bona fide* think so. Of course, it does not follow that what is for the benefit of her son is for Mrs. Sawyer's benefit. But in the present instance she is satisfied; and I agree with her that it would not be for her benefit to refuse the application, since its refusal would involve the loss of the money already expended in giving her son practical experience of the farming business, and would result in his being thrown on her hands, an idle man, to be supported by her; and her own personal wants are adequately provided for by the other settled funds and by her husband's means. I think that, on the whole, these circumstances countervail the personal benefit to be derived by her from the £15 per annum which she will give up. I shall therefore order that Mrs. Sawyer may bind her life interest in the appointed fund, notwithstanding her restraint on anticipation, on the terms that any money raised be paid to the trustees, and applied by them as proposed in Mrs. Sawyer's affidavit.

The Master of the Rolls made the following order:—

> "It appearing to the Judge that it is for the benefit of the applicant that this order should be made, It is ordered that the restraint on anticipation imposed on the said applicant by the said settlement be waived, so far as relates to the sum of £500, portion of the settled funds appointed by the said deed, dated the 6th day of February, 1895, upon the terms of any funds raised pursuant to the said appointment being paid over to the trustees of the said settlement, to be applied by them as mentioned in the aforesaid affidavit of the applicant; and it is ordered that the applicant's and the said trustees' costs of this application and order, including their aforesaid appearance by counsel, be paid out of the said fund."

Solicitors: *St. George & Browne.*

W. L.

Bankruptcy.
1895.
Nov. 12.

IN THE MATTER OF P. J. W., AN ARRANGING DEBTOR (1).

Arranging debtor—Civil bill decree against—Lodgment with sheriff before protection order—Liberty to levy amount.

Liberty given to levy the amount of a civil bill decree lodged in the hands of the sheriff before protection order.

***In re R. C.* (21 L. R. Ir. 546) applied to a civil bill decree.**

ON the 19th March, 1895, Thomas Strevens obtained a civil bill decree against the arranging debtor for £18 16*s*. 4*d*., damages for breach of warranty and costs. The debtor appealed from the decree. The appeal was heard on the 9th July, 1895, when the decree was affirmed with costs. The affirmance of the decree was lodged on the 10th July, 1895, with the sheriff of the county of Roscommon, where the debtor carried on business as a shopkeeper in the town of Athlone. The arranging debtor obtained a protection order on the 13th July, 1895.

At the second private sitting in the matter an application was made on behalf of Mr. Strevens, that the debtor should be directed to provide cash for payment in full of the sum of £25 3*s*., the amount due on foot of the affirmance of the decree, including sheriff's poundage, or that Mr. Strevens should be at liberty to levy the amount notwithstanding the protection order.

Carton, Q.C., in support of the application, referred to *In re R. C. an arranging debtor* (2); 7 Wm. 3, c. 12, sect. 12; 19 & 20 Vict. c. 97, sect. 1; 27 & 28 Vict. c. 99, ss. 4, 20, 23, 24.

BOYD, J., granted the application.

Solicitor for Mr. Strevens: *Daniel S. Doyle.*
Solicitor for the arranging debtor: *Thomas P. Mathews.*

W. G.

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(1) Before BOYD, J.

(2) 21 L. R. Ir. 546.

In the MATTER of the ESTATE of CECILIA GODLEY, Owner; EXECUTRIX of WILLIAM GODLEY, Petitioner (1).

Land Judge's Court.
1895.
Nov. 22, 27.
Dec. 11.

Tenant for life—Merger of charge voluntarily acquired—Intention—Disposition fraudulent against creditors—10 *Car.* 1, *sess.* 2, *c.* 3.

A mortgage affecting the fee of settled lands having been bequeathed to the tenant for life, he, while in solvent circumstances, evidenced an intention to merge the mortgage debt in the inheritance. There was no evidence of any contrary intention during the remainder of his life. At his death he was insolvent:—

Held, that a merger of the charge took place as of the earliest date to which, upon the evidence, the intention to merge was referable.

Semble, merger of a charge by expression of intention is a disposition of property within the 10 Car. 1, sess. 2, c. 3 (Ir.), and would be void and inoperative, if fraudulent, as against creditors.

Query. Can a disposition of property be impeached as fraudulent under the statute at suit of the personal representative of the person by whom such disposition was made, even when acting under a judgment of the Chancery Division in an administration action, directing the asset so disposed of to be realised for the benefit of creditors?

Query. Is an unequivocal expression of intention by the tenant for life to merge a charge in the fee revocable?

Motion to make absolute the conditional order for sale notwithstanding cause shown by the owner. The petitioner was executrix of William Godley, deceased, who died on the 30th January, 1894. His estate which was an insolvent one, had been administered in the Chancery Division where the executrix was directed by the judgment on further consideration to call in a mortgage for £500 on the lands in this matter of which William Godley had been tenant for life. The owner alleged that this mortgage had been merged by express declaration of intention by William Godley in his lifetime. The petitioner not only disputed the evidence on this point but contended that a merger would have been void as a fraud upon the creditors of William Godley. The material facts and the inferences which the Court drew from the evidence are fully stated in the judgment of Mr. Justice Madden.

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(1) Before Madden, J., sitting for the Land Judge.

Serjeant Campion, Q. C., and *G. Fetherstonhaugh*, for the petitioner :—

The time and mode of the alleged merger and the circumstances of the case are important. In *Lindsay* v. *The Earl of Wicklow* (1) Sir Edward Sullivan, M.R., says (p. 204) : "I take it to be clear law that a tenant for life, when he pays off charges affecting the inheritance, is under no obligation to do anything, say anything, or to preserve evidence of anything, beyond the fact of the payment of the charge, to entitle him to keep it alive and raise it for the benefit of his personal estate. It is a total misapprehension of the law—to say the least of it—to say that he is bound to prove an intention to do so. The law raises for a tenant for life and implies a presumption that when he pays off a charge he pays it off for his own benefit." There is no difference between a tenant for life purchasing a charge and acquiring it by gift. In each case by merging it he dedicates his own money to benefit others.

The opposite side cannot be in a better position than if William Godley had executed a deed releasing the charge. But this would have been a fraud on his creditors : *Spirett* v. *Willows* (2) ; *Freeman* v. *Pope* (3). A voluntary settlement is fraudulent in two cases, first, if the settlor be at at the time insolvent ; secondly, if he thereby withdraws so much of his property as renders himself insolvent. Here both these circumstances are found united. We represent creditors ; we are seeking to realize this charge for the benefit of creditors in an administration suit. Antecedently to the letter there is no tangible evidence of intention to merge. Such an intention is ambulatory and may be revoked at any time during the existence of the tenant for life.

The Solicitor-General (*Kenny, Q. C.*), and *Christie*, for the owner; and *Price, Q. C.*, for Clara Mary Godley the infant daughter of the owner:—

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(1) Ir. R. 7 Eq. 192. (2) 3 De G. J. & S. 293. (3) L. R. 5 Ch. App. 538.

The petitioner cannot impeach this transaction under the 10 Car. 1, sess. 2, c. 3. No one but a creditor or his representative can take advantage of a disposition of property being void under the 13 Eliz. c. 5, and no one but a subsequent purchaser can claim the benefit of the 27 Eliz. c. 4, the statutes in England corresponding to the 10 Car. 1, sess. 2, c. 3; May on Voluntary Conveyances, 2nd Ed., p. 463. Where the action is brought after the settlor's death the plaintiff must be a creditor, and not the executor. The executor does not represent the settlor's creditors, but the settlor; and against him and his representatives the settlement is binding: *Ibid.* 525, distinguishing *Elmslie* v. *M'Aulay* (1). The fact of there having been a decree in an administration suit does not make any difference: *Hawes* v. *Lauder* (2). The judgment in the administration suit gave the plaintiff therein liberty to proceed as she might be advised. It in no way directed the present proceeding, and must be regarded as a neutral fact in the case. Section 10 of the Irish Act, 10 Car. 1, sess. 2, c. 3, is the same as the 13 Eliz. c. 5. The words "only as against that person or persons, whose actions, &c., are thereby delayed and defrauded," occur in both statutes.

As to merger: see *Astley* v. *Milles* (3) judgment of the Vice-Chancellor, at p. 343; *Jones* v. *Morgan* (4) judgment of Lord Thurlow, p. 217. [Powell on Mortgages, 361; *Robinson* v. *Gee* (5); *Lloyd* v. *Thursby* (6); *Hill* v. *Brown* (7), were also cited.]

Fetherstonhaugh, in reply:—

We have here the converse of the case of the estate descending on the owners of the charge. If, as is laid down by Lord Chancellor Brady, in *Lysaght* v. *Lysaght* (8), the intention to merge is ambulatory, it cannot be predicated until the death

(1) 3 Bro. C. C. 624.
(2) Cro. Jac. 270.
(3) 1 Sim. 298.
(4) 1 Br. Ch. Cas. 206.
(5) 1 Ves. Sen. 251.
(6) 9 Mod. 463.
(7) 6 Ir. Eq. R. 403.
(8) 4 Ir. Jur. 110.

Land Judge's Court. 1895.

In re Godley's Estate.

of the tenant for life that merger has actually taken place. It is only then that a previously expressed intention becomes effective. But whatever were his circumstances in 1890, William Godley was unquestionably insolvent at the time of his death, and to merge the charge at that time would have been a fraud on creditors and void. The intention to merge is revocable. The *dictum* of Lord Cranworth in *Morley* v. *Morley* (1) is not in point: *Swinfen* v. *Swinfen* (2). The Court is not to presume an intention which would have the effect of defrauding creditors. William Godley had, at least a potential estate in this charge at the time of his death. There are persons who were creditors in 1889, who are still unpaid. This brings the case directly within the principle of *Spirett* v. *Willows* (3).

Dec. 11.

Madden, J.:—

The petition in this case has been presented on foot of a mortgage executed on the 27th July, 1878, to J. H. Jessop for the sum of £500. This mortgage originally affected a base fee in a perpetual yearly rentcharge of £300, issuing out of the lands comprised in the petition. But by virtue of an indenture of family settlement, dated the 18th December, 1882, it is now secured by a term of 1000 years, carved out of the fee-simple of these lands. J. H. Jessop, the mortgagee, left his property, including this mortgage, to his sister Catherine Jessop, who, in turn, left the mortgage to her cousin William Godley. She died on the 3rd November, 1890, and William Godley died on the 30th January, 1894, having appointed the petitioner executrix of his will, by whom it was duly proved.

So far the title of the petitioner is complete. But William Godley, to whom this mortgage was left by Catherine Jessop, was then tenant for life of the mortgaged lands; and the owner, who claims under the remainderman, shows cause against the conditional order for sale, upon the ground that the mortgage has merged in the fee-simple and inheritance of the land by virtue of an intention to that effect expressed by William Godley, the tenant for life of the lands, after he became, upon the death of Catherine Jessop in 1890, absolute owner of the mortgage.

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(1) 5 De G. M. & G. 610, at p. 626. (2) 29 Beav. 199; see p. 204.

(3) 3 De G. J. & S. 293.

That this was the intention of William Godley at the time of his death cannot be disputed, in the face of a letter written by his direction on the 14th January, 1894, in which he gives instructions for the preparation of a formal deed of release. I am satisfied upon the evidence that in so doing he was only carrying out the intention which he had constantly in his mind from the time of his acquisition of the mortgage. The owner, Mrs. Cecilia Godley, in her affidavit, filed the 31st October, 1895, deposes to statements made by William Godley to this effect, going back to within six months after the death of Catherine Jessop. She has not been cross-examined, and I have no hesitation in acting upon her statements, which are in entire accordance with the indisputable intention of William Godley in the year 1894, and with the probabilities of the case. I am satisfied that he always intended that the Jessop mortgage should merge in the inheritance, and that it should not be raised by his personal representatives.

But the petitioner contends that even if this were his intention, William Godley was never in a position to carry it into effect, inasmuch as his circumstances were such as to render a voluntary disposition or gift of this mortgage a fraud upon his creditors within the provisions of the Irish Act 10 Car. 1, sess. 2, c. 3, corresponding to 13 Eliz. c. 5. Now under ordinary circumstances the petitioner, as personal representative of William Godley, could not be heard making such a case. She would be bound by the act of her testator. But it is contended that inasmuch as the assets of William Godley have been administered in the Chancery Division in the action of *Wiseman* v. *Godley*, and have been there found deficient, and inasmuch as the petitioner is proceeding in this Court to collect outstanding assets for the purpose of paying creditors, she may be considered as representing creditors in this matter, and is entitled to make whatever case a creditor could have established against a voluntary disposition of the mortgage in question. I will assume that this is so, without entering into some nice questions of general law, and of the procedure of this Court, which would arise for consideration if it were necessary to decide the point.

BIBL. LONDIN. UNIV.

William Godley was clearly insolvent at the time of his death in 1894. If the merger of the charge in the estates is referable to that date, I am disposed to think that it would be void under the statute, as a disposition by way of gift withdrawing property from his creditors, and that the mortgage could be raised notwithstanding his clearly expressed intentions to the contrary. The point does not appear to have been decided. But the merger of a charge by a tenant for life, whether by deed of release or by expressed intention, seems to me to be a disposition, withdrawing from his creditors property under his control. It could I think be set aside, and the charge raised—at all events in a properly constituted action, in which a creditor should be plaintiff and the owner of the estate and the personal representative of the tenant for life defendants—upon proof that fraud upon creditors was either the motive or the result of the transaction.

The owner, however, contends that the merger must be taken as effected, not at the death of the tenant for life, but at the date of his acquisition of the mortgage, inasmuch as thenceforth and up to the time of his death he consistently intended that it should merge. He further contends that William Godley, though insolvent in 1894, was solvent when he became entitled to the mortgage in November, 1890, and capable of disposing of it for the benefit of the inheritance.

In determining the former of the questions thus raised I have not the guidance of any decided case, and it therefore becomes necessary to consider certain general principles. The law of merger of charges, unlike the legal doctrine of merger of estates, is founded, not upon feudal principles, but upon certain clear and well-defined doctrines of equity, engrafted upon a principle borrowed from the civil law. According to the civil law the *confusio* caused by the union in the same individual of the characters of debtor and creditor, extinguished the debt. By analogy, it was held that the union in the same person of an estate in lands and a charge affecting the same estate, operated to merge the charge. But equity intervened to give effect to intention expressed or implied. In the words of Lord Macnaghten (*Thorne* v. *Cann* (1)) :

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(1) [1895] A. C. 18.

"Nothing I think is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished, or kept alive for his benefit, is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

In accordance with these principles, when a tenant in fee becomes owner of a charge, the latter is *prima facie* merged, in the absence of expressed intention to the contrary on the part of the owner of the estate; unless by reason of intervening incumbrances or otherwise he has an interest in keeping it alive, in which event an intention is implied in accordance with his interest. But when, as in the present case, the owner of the charge is tenant for life of the estate, no principle analogous to *confusio* applies. The charge is accordingly *prima facie* unmerged, and capable of being raised by the personal representative of the tenant for life. But in this case also the presumption is capable of being rebutted by evidence of intention on the part of the tenant for life that the charge should merge in the inheritance.

The question arises, at what point of time does this merger take place: at the date of the union of estate and charge, at the death of the person whose intention is in question, or at some intervening date? It was laid down in *Swinfen* v. *Swinfen* (1) that where a tenant in fee becomes entitled to a charge, the presumption of merger arises on his death. This is indeed obvious in the case of absolute ownership of both estate and charge; for merger is presumed as the result of silence on the part of the owner of the estate, and this silence may be broken, and the presumption rebutted, so long as he is alive. It is premature finally to conclude that a charge is merged, or a man happy, until all possibility of an opposite condition has been removed by death. The question is a different, and a more difficult one, where merger is the result, not of mere abstention from action, but of certain words or deeds on the part of the owner of the estate, evidencing an intention contrary to that which would be presumed in the absence of evidence. It seems to be now clearly settled that the tenant for life has the whole of his life during which he may negative this presumption by expressed intention, and that in this sense, in the words attributed to Brady, C., in *Lysaght* v. *Lysaght* (1) "the intention is ambulatory, as it were, until the death of the tenant for life." It has, indeed, been questioned whether the intention in such cases is ambulatory in the testamentary sense of the term; that is to say, whether a tenant for life who has once expressed an intention to merge a charge, can afterwards give effect to a contrary intention. If he had actually released the estate, even by a voluntary deed, without reserving a power of revocation, he could not afterwards revive the charge. And Lord Cranworth plainly considered that the payment off of a charge might, under certain circumstances, have the same effect. In *Morley* v. *Morley* (2) he is reported to have said:—"*It is necessary to show that he did at the time intend to keep it alive*, for I take it to be clear that if a tenant for life pays off an incumbrance intending to discharge the inheritance, he cannot afterwords say: 'I have altered my mind and will now revive it.'" The words in this passage which I have italicised were commented on by Sir E. Sullivan, M.R., in *Lindsay* v. *Earl of Wicklow* (3). In that case the presumed intention of a tenant for life to keep a charge alive was sought to be rebutted by certain recitals in a deed, which taken by themselves and unexplained, afforded evidence of intention to merge. The Master of the Rolls treated this deed as evidence merely, capable of being encountered and overcome by a long series of acts on the part of the tenant for life consistent only with an intention to keep the charge alive. Of the words in italics he says, at p. 205, that they "so far as they are conversant with the position that it is necessary to *prove* an intention on the part of a tenant for life to keep the charge alive, must be inaccurate; I doubt if they were delivered by him as they stand." But as regards the remaining portion of the passage quoted, he adds (at p. 209): "I do not mean to invade in the smallest degree the position which has the high authority of Lord Cranworth's *dictum*, in *Morley* v. *Morley* (1), that if a tenant for life, when he pays off the charge, at that moment declares an intention to release the estate from the charge, he can never afterwards revive it: although I may say that there are some observations of Lord Chancellor Brady, in *Lysaght* v. *Lysaght* (2) which would tend to show that in his opinion the intention of the tenant for life ought to be regarded as ambulatory until his death. However, I say nothing about that—I have no such case before me."

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(1) 29 Beav. 199.

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(1) 4 Ir. Jur. at p. 112. (2) 5 De G. M. & G. 626. (3) Ir. R. 7 Eq. 192.

Although Lord Cranworth's opinion, assuming it to be correctly expressed and reported, is not directly in point in the present case, the principle which underlies his judgment affords some degree of guidance. It is plain that he regarded merger, when effected by virtue of intention on the part of a tenant for life, as a disposition for the benefit of the inheritance, taking effect simultaneously with the intention of which it is the result. So clearly was this principle present to his mind, that he was prepared to bind a tenant for life (under certain circumstances at all events) by his intention once expressed. His observations were directed to the case of a tenant for life actively intervening to pay off a charge with the intention of extinguishing it; and he appears to have thought that such a transaction would have the same effect as a release by deed, which, in the absence of a power of revocation, would have conclusively bound him. No doubt the case before me is a different one. Here the union of the life estate and the charge is not the result of any act on the part of the tenant for life, prompted by some definite intention, whether of relieving the inheritance or of acquiring the charge. In a case like the present you would naturally seek for intention, not necessarily at the precise moment of union of estate and charge, but throughout the lifetime of the tenant for life. The charge is presumed to remain his proper money unless evidence be forthcoming of intention to the contrary; and (applying the principle of *Swinfen* v. *Swinfen* (3)) he has the whole of his lifetime to express such an intention. But it does not follow from this proposition that the precise time of merger must be taken to be the date of his death. The date to which the intention, and the consequent merger of the charge are referable is, in my opinion, a matter of evidence in each individual case, in the same manner as the fact of the existence of an intention to merge. Some analogy is afforded by the law, as it is now settled, with regard to presumption of death after seven years. A man who has not been heard of for seven years is, when that period has expired, presumed to be dead. But the precise time at which death occurred is a matter of evidence in each case. In the case before me I conclude from the evidence that William Godley intended the charge to merge from the date of his acquisition of it. Why should I dissociate the merger from the intention, of which it is the result, and post-date the former? Even if it should be ultimately held that where the matter rests in intention only, the ultimate intention prevails, I see no reason why the disposition thus effected should be post-dated, and referred to the death of the tenant for life. The difficulty is caused by the use of the word ambulatory, and by the supposed analogy of a testamentary disposition. But merger, in a case like the present, is a disposition *inter vivos*, the creation of equity in order to effectuate intention. *Primâ facie*, I should think the date of the disposition ought to coincide with the date of the intention. It is unnecessary for me to consider whether intention once expressed is ambulatory, in the sense of revocable, inasmuch as in the case with which I have to deal the intention to merge was constant throughout. In such a state of facts, I am of opinion that merger takes place at the earliest point of time to which, upon the evidence, the intention to merge is referable. In the present case there never was a time at which, if the tenant for life had then died, his personal representative could have maintained that the charge was raisable against the estate.

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(1) 5 De G. M. & G. 610. (2) 4 Ir. Jur. 110. (3) 29 Beav. 199.

Various circumstances have been relied on by the owner, connected with the origin of this mortgage, and with the manner in which it was subsequently dealt with; and the will of Catherine Jessop has been referred to. These circumstances would not, in my opinion, be sufficient to rebut the presumption, in the absence of evidence of intention, and I do not deem it necessary to consider them in detail.

The question remains, did the circumstances of William Godley at the death of Catherine Jessop on the 3rd November, 1890, render the merger of the charge a fraud on his creditors? The burden of proof rests on the petitioner, assuming her to be legally entitled to raise this question. She has made an affidavit in *Wiseman* v. *Godley* upon an application to set aside as a fraud upon his creditors, a voluntary assignment in her favour of a policy of assurance executed by William Godley on the 12th February, 1889. The assignment was upheld by the Vice-Chancellor. It is evident from this affidavit that the ground of his decision was not (as suggested in argument) the trifling amount of property withdrawn from creditors by this deed, but the solvency of William Godley. The petitioner swore (in the 4th paragraph of her affidavit, filed on the 3rd July, 1894), that Catherine Jessop "left him (William Godley) £2000 in money, released a mortgage upon his estate for £500, with any interest due thereon, also released from a simple contract debt of £85." I have not decided this case upon her representation with regard to the merger of the charge of £500; but I accept her statement that William Godley was perfectly solvent in February, 1889, and that his subsequent insolvency was largely due to the debts of his son John Godley for which he made himself responsible. Indeed I am bound to do so, having regard to the Vice-Chancellor's order. It was not until Dec., 1890, that John Godley compounded with his creditors, and I am of opinion that the petitioner has failed to prove that his circumstances were in the month of November such as to render a release or merger of the charge a fraud upon his creditors. I therefore allow the cause shown with costs.

Solicitor for the petitioner: *Fetherstonhaugh.*
Solicitor for the owner: *Shannon.*

W. G.

Appeal.
1895.
Oct. 25.

KAVANAGH *v.* WORKINGMAN'S BENEFIT BUILDING SOCIETY (1).

Mortgagee in possession—Collecting rents—Commission—Joint Stock Company—Appointment of one of their own directors.

The defendants, who were mortgagees of two houses at C., in the county of Dublin, went into possession as mortgagees, and appointed M., one of their directors, to collect the rents as their agent:—

Held, that he could not be allowed any commission out of the rents.

The action had been brought by J. P. Kavanagh, who was second incumbrancer, under a judgment mortgage dated the 8th April 1881, against the defendants who were first mortgagees under a mortgage dated the 21st June 1880. The mortgaged property consisted of three houses at Clonliffe, in the county of Dublin. The mortgage of the 21st June, 1880, contained a power to appoint a receiver, and in the month of July, 1881, the defendants appointed John Maher, one of the directors of the defendant company receiver to collect the rents. In the accounts brought into Chambers by the defendants, under the decree, they charged £5 per cent. commission for collecting the rents, which was disallowed by the chief clerk. On a reference from Chambers to the Vice-Chancellor, the Judge, by order dated the 1st July, 1895, upheld the ruling of the chief clerk. From that order the company appealed.

Houston, Q.C., and *Sugrue* for the appellants:—

This is not a case of an appointment by a mortgagee of himself as receiver, but of a third person who is a totally different entity. The mortgagees are a corporation, and the receiver appointed is John Maher; there is nothing unlawful in their appointing one of their own number: *Eales* v. *Cumberland Black Lead Company* (2).

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(1) Before Lord Ashbourne, C., and FitzGibbon, Barry, and Walker, L.JJ.

(2) 6 H. & N. 481.

Moreover he was the best person to appoint, because the Company is a trustee who must do their best for their shareholders.

Serjeant Jellett, Q.C., and *Eustace Johnston*, for the respondent, were not called upon.

Lord Ashbourne, C. :—

We are all of opinion that the order of the Vice-Chancellor is right, and I think there is nothing here to create a doubt about the order. The question does not depend on the minute distinctions of cases, it rests on the broad principles of equity. A mortgagee in possession has no right to do anything which can impose the smallest liability on his mortgagor against the principles of equity. In this case, the mortgagee in possession is a corporation, but that makes no distinction. Finding it right to go into possession they did so, selecting one of their own board to receive the rents. But has that person the right against the mortgagor to claim commission? I am of opinion that he has not, because that director so appointed might have voted for his own appointment, and moreover he might have voted for his own rate of remuneration. That is against public policy. The cases when looked at are all against Dr. Houston and Mr. Sugrue. *Eales* v. *The Cumberland Black Lead Mine Company* (1) was a case in which the directors of a Company appointed one of their own number manager, who brought an action against the Company for his remuneration and it was held that, under the provisions contained in table B of the statutory provisions 19 & 20 Vict. c. 47, the directors had power to make the appointment and that it was not illegal, and that the person ceased to be a director in pursuance of the statutory provisions once he became a paid officer of the Company. There was another case referred to by Lord Justice Walker of *Nicholson* v. *Tutin* (2), a decision of Page-Wood, V. C., in a case similar to this. In giving judgment that learned Judge said :—" I do not think that it is competent for a trustee to accept such a position and to raise a claim of such an indefinite nature, unless there had been previously a special contract that he should have compensation, or such a case of necessity as would justify such a claim, if made by a mortgagee in possession. But the persons to determine whether or not there was such a necessity, or to make such a contract in this case would be the trustees themselves, of whom Watson was one. He would have to decide concerning the commission to be allowed to himself. The case therefore falls within the principle laid down by this Court, namely, that it will not allow a person to put himself in a position where his interest will be inconsistent with his duty."

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(1) 6 H. & N. 481. (2) 3 K. & J. 159.

I think this case is a plain one, that the appellant is not entitled to commission, and the appeal must be dismissed with costs.

FITZ GIBBON, L.J. :—

The broad principle is that a mortgagee who goes into possession is a trustee for the mortgagor of all that is not required to pay his own charge, and, as he is bound to keep the charge down as low as possible, he cannot increase it by retaining commission for himself. The case is clear where the mortgagee and the receiver are one and the same person; we have not now to decide whether commission could be charged if a mortgagee Company appointed an ordinary shareholder to be receiver, and I express no opinion upon that question. But here we have as mortgagee a corporation which can act only through its directors, and these directors have appointed one of themselves to be receiver. In my opinion the disability arising from inconsistency of duty arises in such a case. The receiver director, as representing the mortgagee, is bound to keep down the charge as against the mortgagor, and he is also bound not to charge more than his lawful remuneration against his Company for receiving their rent. If, in his capacity of receiver, he got poundage from the mortgagor for work which he ought to do in his capacity of director, he ought to give credit for it against his pay as director. If, in his capacity of director, he was paid fees by the Company for managing the property of which it had taken possession as mortgagee, he ought not to charge poundage besides against the mortgagor, for whom he was a trustee. Public policy and equitable doctrine are both against allowing the claim, which could only be

Appeal.
1895.
KAVANAGH
v.
WORKINGMAN'S
BENEFIT
BUILDING
SOCIETY.

made for the pecuniary benefit of one director through the action of the Board of Directors, against the interest either of the Company or of the mortgagor, to both of whom every director stands in a fiduciary relation.

BARRY, L.J. :—

I concur in holding that the order of the Vice-Chancellor is right. The principle applicable is to be found in *Nicholson* v. *Tutin* (1), and it was not disputed by Dr. Houston and Mr. Sugrue. The only question argued was that as the mortgagee is a corporation and the receiver is a director, the principle does not apply. I cannot see what difference that makes. The director is not the mortgagee himself, but a part of the corporation, which is. Still the position of the one is inconsistent with the other.

WALKER, L.J. :—

The principle which would be applicable in the case of individuals equally I think applies in the case of the directors of this Company. The Corporation mortgagees are trustees *sub modo* for the mortgagor. The Corporation acts by its directors. This gentleman is one of those to decide whether the power to appoint a receiver should be put in force, and what remuneration should be given to the receiver. He has appointed himself receiver, and the principle of equity, which prevents a man asserting a position in point of interest inconsistent with his duty, prohibits the making of the claim against the mortgagor.

Solicitor for the plaintiff: *J. P. Kavanagh, in person.*
Solicitor for the defendants: *John J. Dunne.*

R. D. M.

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(1) 3 K. & J. 159.

Appeal.
1895.
Nov. 26.

M'HENRY v. M'HENRY (1).

(1895. No. 335.)

Practice—Security for costs—Plaintiff residing out of the jurisdiction—Several defendants—Second order for security for costs.

The plaintiff, who resided in America, brought an action against W. M., N. M., D. M., and R. M., for the purpose of having himself declared heir-at-law of J. H. The first three defendants were sued as trustees of the will of J. H., and the fourth had been found to be the heir in a former proceeding. On the 17th June, 1895, the first three defendants, the trustees of the will, obtained an order that the plaintiff should give security for costs, which was measured at £75. R. M., the fourth defendant, who appeared by a separate solicitor, obtained an order on the 23rd July, 1895, that the plaintiff should give security for his costs:—

Held (varying the order of the Vice-Chancellor), that, in the absence of special circumstances, one sum of £75 was sufficient security for the costs; that R. M. was not entitled to a second order for security for his costs, but that the sum of £75 lodged under the order of the 17th June, 1895, should stand security as well for the costs of R. M. as of the other defendants.

This action was brought by James M'Henry, who resided in America, against William M'Henry, Neill M'Laughlin, Daniel M'Laughlin, and Robert M'Henry, for the purpose of having the plaintiff declared heir-at-law of James Hunter, deceased. The first three defendants were sued as trustees of the will of James Hunter.

By the will of James Hunter, Robert James Montgomery, James Boyle, and James Barr Hunter, were appointed trustees and executors, and on the 1st August, 1889, they brought an action in the Chancery Division, Ireland, in the Court of the Master of the Rolls, against William M'Henry, to administer the real estate of James Hunter. On the 3rd December, 1889, an order was made to administer the real estate, and inquiries were directed as to who was heir-at-law. After advertisements were issued the matter was referred by the Chief Clerk to the Judge, and on hearing before Porter, M. R., on the 13th March, 1893, he found that Robert M'Henry was the heir-at-law, and as such entitled to the undisposed of real estate. The certificate was made up on the 1st July, 1893, and on the 15th December, 1893, an order was on further consideration of the Chief Clerk's certificate.

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(1) Before Lord Ashbourne C., and FitzGibbon, Barry, and Walker, L.JJ.

Robert James Montgomery having died, James Barr Hunter desired to retire from the trusts of the will, and accordingly by Indenture, dated the 11th April, 1894, William M'Henry, Neill M'Laughlin, and Daniel M'Laughlin, were appointed trustees of the will, and by the same deed the real estate of the testator was conveyed to them. On the 17th June, 1895, William M'Henry, Neill M'Laughlin, and Daniel M'Laughlin, obtained an order for security for costs against the plaintiff, which was measured at £75. On the 23rd July, 1895, Robert M'Henry, the fourth defendant, who appeared by a separate solicitor, obtained an order for security for his costs for the like amount.

On the 28th October, 1895, the plaintiff applied to the Judge in Court to discharge the order of the 23rd July, 1895, but the application was refused, and from that order the plaintiff appealed. On the 25th November, 1895, the sum of £75 was lodged as security for the costs of the three first-named defendants.

T. F. Molony, for the appellant.

It was never the practice of the Court of Chancery to penalise a plaintiff by making more than one order for security for costs. The two cases on the authority of which the case was decided in the Court below are *Osborne* v. *Bartlett* reported in Beames on Costs, App. IX. and *Lowndes* v. *Robertson* (1). In *Osborne* v. *Bartlett* the assignees of a bankrupt on being made defendants were allowed security, although the original defendant (the bankrupt) had previously obtained it. In *Lowndes* v. *Robertson* (1), Leach, V.-C., after inquiring as to what the practice was, held that if one defendant got security for costs, which was then given by bond for a sum of £40, the clerks of the other defendants in Court could call for a similar bond. Now the bond is given to the party requiring security Or. XXIX. r. 1, but only one sum of £75 is required in ordinary cases.

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(1) 4 Mad. 465.

Drummond, Q.C., and *Christie*, for Robert M'Henry:—

We submit that the order is right. The first three defendants are executors and trustees, while Robert M'Henry is beneficially interested; he is defending from a separate stand-point, and therefore entitled to a separate order for security. In some cases the amount ordered to be given as security is increased: *Sturla* v. *Freccia* (1).

LORD ASHBOURNE, C.:—

This is an action brought by a person claiming to be heir-at-law against four defendants. Three of the defendants applied for an order against the plaintiff for security for costs, and obtained an order on the 17th June that £75 be lodged as security. Later, the fourth defendant applied for security for his costs, and obtained a similar order for a similar sum. Although it is a matter of discretion with the Court what the amount of the security should be, still we can have no doubt that £75 would have been the full amount which the plaintiff would have been ordered to lodge, if all the defendants had joined in the application. The defendants are all interested in resisting the case of the plaintiff, and under these circumstances the plain sense of the matter is that on the plaintiff lodging £75 as security he should be at liberty to proceed with his action; otherwise a man resident abroad might have separate orders against him, at the instance of different defendants, for security for costs, thus penalizing his efforts to proceed. When the Vice-Chancellor was asked to make the second order, he was not given all the information afforded to us, or asked to make an order extending the order already made, or increasing the amount. It is manifest from the argument addressed to us that the first order was lightly regarded; and it was stated that no money had been lodged under it, and that there might not be any lodged under it. We have the whole facts before us; the money was yesterday lodged under the order; the plaintiff has satisfied the obligation imposed upon him of giving security for the costs of the action. The money is lodged, ready to meet such order as the Judge may make. There is nothing to show that it would be reasonable to order the plaintiff to lodge a second sum; and under these circumstances we can not afflict him with a second sum of £75. We shall discharge the order, and declare that Robert M'Henry is entitled to security for his costs; and that the sum of £75, already lodged in pursuance of the order of the 17th, June, 1895, shall stand as security for the costs as well of the defendant Robert M'Henry, as of the other defendants; in the event of the said sum being apportioned by the Court among the defendants regard will no doubt be had to the order of the 17th June, 1895.

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(1) W. N. 1877, p. 166.

Fitz Gibbon, L. J.:—

I base my judgment on the fact that the sum of £75 is the full sum which the plaintiff would have been required to bring in, if all the defendants had joined in obtaining the order of June 17th, 1895. That being so, and that sum having been brought into Court, we cannot put any further bar in the plaintiff's way; we can only extend the security to the fourth defendant, leaving the Court to have due regard to the rights of the other three, under the order which they obtained. Two results will follow from our decision; first, all four defendants will be made slow to run the risk of incurring double sets of costs, if one ought to suffice; and, secondly, defendants in other cases will learn that they must all come in together, and not in Indian file, when they want security for their costs.

Barry, L. J.:—

I do not for a moment say that there is not jurisdiction in the Court to make separate orders for security for costs for separate individuals, in cases where there are special circumstances. I express no opinion upon that. But then we must assume, if the first order had not been made that one order would have been made, and that order would have been an ordinary order for security for costs, to the extent of £75. It was suggested by Mr. Molony, in his very able and clear argument, that once that was lodged nothing more could be done. Well, as I understand that case in the Weekly Notes, the Court of Appeal decided that they will increase the amount of the security, so here I think it was possibly quite within the jurisdiction of the Vice-Chancellor to have increased the amount of £75, when Robert M'Henry came in and asked for security, to a larger sum. But no materials were laid before us to enable us to do so.

WALKER, L. J. :—

I concur with the other members of the Court. I express no opinion as to the question of priority.

Solicitor for the plaintiff: *John Clark.*

Solicitors for the defendant, Robert M'Henry: *Macaulay & O'Neill.*

R. D. M.

ATHY GUARDIANS *v.* MURPHY.

V.-C.
1895.
Nov. 16, 28.

Corporation—Contract by agent—No authority under seal—Want of mutuality —Withdrawal—Ratification.

Though subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown in such a case that there was a contract purporting to be made by and with the agent, which if the agent had authority, would be a valid binding contract.

At a meeting of a dispensary committee, an agreement in writing for the purchase by them, as agents for the Board of Guardians, from the defendant for £60, of a plot of land for a doctor's residence and dispensary, was signed by the defendant and by the chairman on behalf of the committee. The committee had at the time no authority from the Board of Guardians to contract for the purchase of land. The defendant subsequently withdrew his offer, and refused to carry out the agreement. After such withdrawal and refusal the agreement came before the Board of Guardians, and it was approved by them. Neither the agreement nor the approval was under seal.

In a suit by the Guardians for specific performance:—

Held, that—there being nothing under the seal of the Guardians to give effect to the agreement in the only way in which they could bind themselves—there was not any contract which could be ratified by them, so as to make their approval relate back to the date of the agreement, and thus render the withdrawal by the defendant inoperative; and that the Guardians were not entitled to enforce the agreement.

Mayor, &c., of Kidderminster v. *Hardwick* (L. R. 9 Ex. 13) and *Mayor &c., of Oxford* v. *Crow* ([1893] 3 Ch. 535) followed.

Bolton Partners v. *Lambert* (41 Ch. D. 295) and *In re Portuguese Consolidated Copper Mines, Limited* (45 Ch. D. 16), distinguished.

Case Stated by the County Court Judge of Kildare, under the County Court Appeals (Ireland) Act, 1889 (52 & 53 Vict. c. 48), section 6.

The following are the material portions of the case:—The equity civil bill was for specific performance of an agreement in writing dated the 25th May, 1894, in these words:—"The dispensary committee of Castledermot, at the meeting held at the dispensary, have agreed to purchase from Mr. Laurence Murphy the plot of land called 'Carters' situate at Main-street, Castledermot, and held at a rent of £4 a-year, for the sum of £60 sterling for the purpose of a doctor's residence and a dispensary.

Signed on behalf of the dispensary by the Chairman and Mr. Murphy.

MARTIN WALSH, *Chairman.*
25th May, 1894. LAURENCE MURPHY."

The Rev. Martin Walsh deposed that he was Chairman of the dispensary committee. He was present at the meeting on the 25th May, 1894; he drew up the agreement, and the defendant signed it; a few days afterwards the defendant came to him and said he would not carry out the agreement; he said the purchase money was not sufficient and that he should get £100; he told deponent on the 28th or 29th May, that he had made up his mind not to sell under £100. The clerk of the Union produced the minutes of the dispensary committee meeting on the 25th May, 1894, and of meetings of the Board of Guardians on the 6th and 13th June, 1894; he received a draft agreement from the solicitor to the Board and gave it to Mr. Hayden: the 6th June was the first day on which the matter came before the Board of Guardians; there was a meeting of the Guardians on the 30th May, but there was no communication from the dispensary committee. Edward Hayden deposed that the proposal to sell came from the defendant; witness got the draft agreement from the clerk and took it to the defendant and read it to him but he would not take it. The draft agreement was not put in evidence and was said to have been lost or mislaid. No evidence was given for the defendant.

The County Court Judge found as facts—1, that on the 25th May, 1894, the defendant offered the premises for sale to the dispensary committee acting as agents for the plaintiffs at the price of £60, and that the committee as such agents accepted the offer; 2, that the committee were the agents for the plaintiffs for certain purposes connected with the management of the dispensary but had no authority to enter into a contract for the purchase of any lands, and that the plaintiffs were not aware until the 6th June, 1894, that the committee had accepted the defendant's offer, or that it had been made to them; 3, that before the plaintiffs had ratified the acceptance of the said offer, and before the 6th June, 1894, the defendant had withdrawn his said offer or refused to carry out same; 4, that after such withdrawal the plaintiffs ratified the acceptance of the offer by the committee.

The County Court Judge held as conclusions of law—1, that the ratification by the plaintiffs related back to the acceptance of the defendant's offer by the dispensary committee, and that therefore the repudiation of the agreement by the defendant was inoperative; 2, that the defendant could not rely as against the guardians seeking specific performance upon the want of a contract under seal, or upon the fact that it was not made or entered into according to the forms laid down by the Local Government Board.

The County Court Judge accordingly made a decree dated the 30th March, 1895, for specific performance of the agreement.

The questions for the Court were:—1, whether the County Court Judge was at liberty to hold that the plaintiffs had ratified the agreement between the defendant and the dispensary committee; 2, whether the plaintiffs had power to ratify the agreement after the defendant had withdrawn from and repudiated the same; 3, whether the Judge was right in holding that the ratification related back; 4, whether the defendant could rely on the contract not being under seal.

The following is an extract from the minutes of the dispensary committee:—

25th May, 1894.

The dispensary committee purchased from Mr. Laurence Murphy the plot of ground known as "Dr. Carter's" in the town of Castledermot (as a site for a dispensary house and residence) for the sum of £60. Agreement signed by Mr. Murphy and the Chairman in presence of the committee.

The following are extracts from the minutes of the Board of Guardians:—

6th June, 1894.

The Honorary Secretary of the Castledermot Dispensary Committee forwarded an agreement between them and Mr. Laurence Murphy, Castledermot, for the purchase of a site which they propose taking for the purpose of erecting a dispensary house and residence.

Ordered, that the agreement referred to be sent to the Board's solicitor requesting him to at once prepare a formal agreement, which agreement will be submitted to the Guardians at their next meeting.

13TH JUNE, 1894.

Read minutes of a special meeting of the Castledermot Dispensary Committee at which Honorary officers were appointed.

The Committee arranged with Mr. L. Murphy for the purchase of the field known as "Carter's" farm in the town of Castledermot as a site for a dispensary house and residence for the sum of £60, and formally entered into an agreement with Mr. Murphy for the sum of £60.

Approved.

The Solicitor-General (*Kenny, Q.C.*) (with him *J. B. Falconer*), for the defendant:—

Irrespective of the question of ratification decided by the County Court Judge there never was any valid or binding contract by the guardians. Even if they purported to contract under the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), they could do so only under seal (see sect. 201); and there is no such contract here. The document of the 25th May, 1894, is not sealed by the guardians, and they never under seal gave any authority to the dispensary committee, or to its chairman to contract on their behalf. Even the minutes of the 13th June, 1894 (subsequent to the withdrawal by the defendant), purporting to approve of the contract, are not under seal. The guardians therefore were never bound, there was no mutuality, and they cannot enforce the contract though signed by the defendant: *Mayor &c., of Kidderminster* v. *Hardwick* (1). In that case Kelly, C.B., refers (p. 20) to the judgment of Tindal, C.J., in *Fishmongers' Company* v. *Robertson* (2), and adopts the following passage (3): "It may possibly be the case, that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a *nudum pactum* only." Pigott, B., also in *Mayor, &c., of Kidderminster* v. *Hardwick* (1) (p. 22), says: "I think there was no mutuality for want of the plaintiffs' seal"; and Pollock, B., says (p. 23): "The action is brought by a corporation for breach of an executory contract, and it is open to the defendant, under the circumstances, to show that, though it was signed by himself, it was not binding on him in consequence of the plaintiffs' not being bound." That case was followed in *Mayor, &c., of Oxford* v. *Crow* (1). The cases of *Bolton Partners* v. *Lambert* (2), and *In re Portuguese Consolidated Copper Mines, Limited* (3) may be relied on for the plaintiffs; but they are not authorities on the principal question here. In the former case there was no defect in the contract itself; the offer by the defendant, and the acceptance by the managing director constituted a valid contract, subject to its being shown that the latter had authority from the Company; and the decision was that the subsequent ratification related back to the date of the acceptance, and that therefore the withdrawal by the defendant was inoperative. Here the matter is not one depending only on the authority of an agent; there is no contract at all, and even the approval of the 13th June is not under the plaintiffs' seal. Similarly in *In re Portuguese Consolidated Copper Mines, Limited* (3), the only question was one of authority in an agent to contract; there was no infirmity in the contract itself. There is nothing to prevent the defendant's relying on the want of a seal. In *The Bournemouth Commissioners* v. *Watts* (4), on the authority of which apparently the County Court Judge decided this point, the contract had been carried out and the person seeking to rely on the want of a seal was a third party sued for a portion of the amount expended. That case has no application to the present.

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(1) L. R. 9 Ex. 13. (2) 5 M. & G. 131. (3) *Ibid.* p. 194.

Meredith, Q.C., and *Molony*, for the plaintiffs:—

The defendant having himself signed the contract, may be sued on it, and cannot rely on the want of a seal by the plaintiffs. The case is analogous to that of a contract required by the Statute of Frauds to be in writing. In such a case a party who has not signed the contract may enforce it against one who has. In Fry on Specific Performance (3rd Ed.) p. 220, the ground for this rule is discussed in relation to the doctrine of mutuality; and it is stated that a more satisfactory reason is, that by instituting proceedings, the plaintiff has waived the original want of mutuality, and rendered the remedy mutual. Similarly in *The Queen* v. *Prest* (1), where a municipal corporation paid the town clerk for extra services, as to which there was no retainer under seal, an application for a writ of *certiorari* to quash the order for payment was refused. That case was followed in *Reg.* v. *Mayor of Norwich* (2). Both those cases are referred to in the judgment of Hawkins, J., in *The Bournemouth Commissioners* v. *Watts* (3), where he says (p. 90), "These two cases warrant us in coming to the conclusion that an urban authority is not bound in an action for work done for them to set up the absence of a sealed contract, and if they do not choose to set it up as between themselves and the contractor any one in the position of the defendant cannot be allowed to raise the objection." The plaintiffs here do not set up the absence of a seal: they waive any objection to the contract on the ground of absence of a seal, and the defendant cannot therefore rely on the want of it as against the plaintiffs seeking specific performance. The case of *Bolton Partners* v. *Lambert* (4) is decisive in favour of the plaintiffs on the second point. There it was held that the ratification of a contract by the plaintiffs seeking specific performance related back to the acceptance by a person who purported to act as an agent for the plaintiffs, but who was not in fact authorized to make a contract for sale on their behalf, and that therefore the defendant could not withdraw the offer. Similarly, here, the defendant's offer was accepted by the dispensary committee who purported to act as agents for the plaintiffs, although they were not authorized to make a contract for purchase; but once the plaintiffs ratified the acceptance, the ratification related back to the acceptance by the dispensary committee. The case of *In re Portuguese Consolidated Copper Mines, Limited* (5) is to the same effect. [Counsel also referred to the judgment of Tindal, C.J., in *Arnold* v. *The Mayor of Poole* (6)].

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(1) [1893] 3 Ch. 535.

(2) 41 Ch. D. 295.

(3) 45 Ch. D. 16.

(4) 14 Q. B. D. 87.

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(1) 16 Q. B. 32.
(2) 30 W. R. 752.
(3) 14 Q. B. D. 87.
(4) 41 Ch. D. 295.
(5) 45 Ch. D. 16.
(6) 4 M. & G. 860.

Falconer, in reply:—

On the case of *Bolton Partners* v. *Lambert* (1), see the note in Fry on Specific Performance (3rd. Ed.) p. 711, and the judgment of North, J., in *In re Portuguese Consolidated Copper Mines, Limited* (2); moreover, *Bolton Partners* v. *Lambert* (1) was quite a different case from the present. There the contract was made by the managing director of the plaintiffs, a limited company; it was not void but voidable; and no seal was necessary to bind the Company: see the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37. Here the contract was made by the dispensary committee who are no branch of the Board of Guardians, and are not necessarily even members of that body. The Rev. Martin Walsh could not be a guardian: 1 & 2 Vict. c. 56, s. 19. The dispensary committee have well-defined duties. See Rules for the government of dispensary districts; Mooney's Poor Law, 455, 460. Moreover, the County Court Judge has found that the committee had no authority to enter into the contract, and he has also found that there was a repudiation by the defendant. By the common law the plaintiffs could only contract under seal. Cases deciding that a third party could not rely on the want of a seal to invalidate payments under a performed contract have no application to the present.

THE VICE-CHANCELLOR:—

Nov. 28.

The contract, for the specific performance of which the civil bill is brought, was one for a sale by the defendant to the plaintiffs of premises required for a residence of a dispensary physician and a dispensary house in the Poor Law Union of Athy and town of Castledermot, for the sum of £60. A negotiation for the purchase was entered into by the dispensary committee of Castledermot with the defendant, and resulted in a written document dated the 25th May, 1894. [His Lordship read the agreement.]

The dispensary committee had no power to enter into this agreement, or to make the purchase, as the Board of Guardians, either as Sanitary Authority, or as the Guardians of the Union, were the only persons capable of acquiring lands for the purpose,

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(1) 41 Ch. D. 295.

(2) 45 Ch. D. 16, 21.

V.-C.
1895.
ATHY GUARDIANS *v.* MURPHY.

and derived their power to do so only from statute. The Guardians had no power to delegate any such authority to the dispensary committee, and as appears by the case stated did not purport to do so. They now sue in their corporate capacity to enforce performance of the agreement as having been made by the dispensary committee as their agents for the purpose. Such agency could only be created under the corporate seal of the plaintiffs, and no sealed appointment was made by them. The Guardians themselves could not lawfully contract for such purpose except by instrument under seal, and the contract sued on was never sealed by them.

It appears from the case that a few days after the agreement was signed, and before any act was done by the plaintiffs, and even before they had heard of the transaction, the defendant refused to carry it out. The learned Judge states that before the plaintiffs had ratified the acceptance of the defendant's offer, and before the 6th June, 1894, which was the first time the transaction was brought to the notice of the plaintiffs, the defendant had withdrawn his said offer, and refused to carry out the same. The plaintiffs, however, rely upon a ratification by them of the supposed contract, by a resolution passed by them on the 13th June, 1894. [His Lordship read this resolution.] This was evidenced merely by the word "approved" as there appearing, and was not sealed by the Guardians. No further ratification took place.

The question then is, was there ever a concluded agreement between the plaintiffs and the defendant? Mutuality is of the essence of every contract. The plaintiffs never bound themselves by this contract till at soonest the 13th June, 1894; never heard of it till the 6th June, before which time the defendant had distinctly refused to perform it. As a general rule either party may withdraw from a contract till it has been conclusively entered into by the other contracting party. If this rule applies here, there never was a time when both the plaintiffs and the defendant were bound to this contract, so that there could never have been any mutuality between them.

But it was contended by the plaintiffs, and held by the learned County Court Judge, that there was a ratification by the plaintiffs which operated retrospectively on the principle expressed by the maxim, "*Omnis ratihabitio retrotrahitur et mandato æquipdratur*," and which covered by intendment of law the whole period from the time the document was signed by the chairman of the dispensary committee, and that this deprives the defendant of his right to withdraw his offer. The authorities relied on at each side seem to be difficult of reconcilement. The appellant relies on the case of *Mayor, &c., of Kidderminster* v. *Hardwick* (1), in the Court of Exchequer, where a corporation sued the defendant on a contract to let lands. The contract was not executed by the plaintiffs under their common seal; the defendant refused to carry out his contract; after which the corporation passed a resolution under seal ratifying the letting to the defendant, and on his refusal to complete, they brought an action for damages for his breach of contract. It was held by the Court that the action could not be maintained, for that the contract was one requiring to be under seal, and therefore the defendant was not bound by it; and that the resolution of the corporation under seal came too late, being after the defendant had withdrawn from his contract. This decision was followed in the recent case of *Mayor, &c., of Oxford* v. *Crow* (2), where the defendant proposed by letter to take a lease of premises belonging to the corporation, and his proposal was accepted by a committee of the corporation, subject to the approval of the corporation, by a letter from the Town Clerk to the defendant, the committee not having been appointed by the corporation under seal, and there being no acceptance under seal of the defendant's proposal. Subsequently the defendant wrote to the Town Clerk withdrawing his offer, upon which the corporation sued him for specific performance, and the case was heard by Romer, J., who dismissed the action, holding that the contract was one which must be under seal, that it was not under seal, nor signed by anyone on the part of the corporation authorized under seal; that it was not ratified under seal, and that the case was governed by the authority of *Mayor, &c., of Kidderminster* v. *Hardwick* (1).

The case principally relied on by the plaintiffs, and that on the authority of which the learned County Court Judge decided, was that

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(1) L. R. 9 Ex. 13.

(2) [1893] 3 Ch. 535.

V.-C.
1895.

ATHY
GUARDIANS
v.
MURPHY.

of *Bolton Partners* v. *Lambert* (1) where an offer for purchase was made by the defendant to an agent of the plaintiffs, who had not authority to make a contract for sale, and was accepted by him on behalf of the plaintiffs. The defendant withdrew his offer, and after the withdrawal the plaintiffs ratified the acceptance of the offer by their agent. It was held that the ratification related back to the acceptance by the agent, and therefore the withdrawal by the defendant was inoperative, and judgment for specific performance was given. This decision appears to be at variance with the other cases I have mentioned, but assuming it to be a conclusive authority for the proposition that if there be a transaction between one of the parties to a contract with the unauthorized agent of the other party, it is capable of being validated by the principal ratifying the act of his agent, it remains to be seen whether it rules the present case. Cotton, L.J., in his judgment (p. 307), said that he thought the proper view was that the acceptance by the agent did constitute a contract subject to its being shown that he had authority to bind the Company, that if that were not shown it would be no contract on the part of the Company, but when and so soon as authority was given to the agent to bind the Company, the authority was thrown back to the time when the act was done by the agent, and prevented the defendant from withdrawing his offer because it was then no longer an offer, *but a binding contract.*

Lindley, L.J., assents to the proposition as an ordinary principle of law that an offer may be withdrawn before acceptance, but he goes on to say that the question is acceptance by whom; and whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not been authorized, there can or cannot be a withdrawal of the offer before the ratification of the acceptance. He said that he could find no authority t warrant the contention that an offer made, and in fact accepted b a principal through an agent or otherwise can be withdrawn; an that the true view on the contrary appeared to be that the doctrin as to the retrospective action of ratification is applicable. Lope

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(1) 41 Ch. Div. 295.

L.J., takes the same view and says that on the adoption of the contract of the agent, the doctrine of ratification applied and gave the same effect to the contract made by the agent as it would have had if the agent had been clothed with a precedent authority to make it. It does not appear that the case of *Mayor, &c., of Kidderminster* v. *Hardwick* (1) was referred to.

This case therefore assumes throughout that the contract with the agent was in itself a binding contract, subject only to the proof of authority, original or by ratification, in the agent.

The case of *In re Portuguese Consolidated Copper Mines, Limited* (2), was also relied on by the plaintiffs, and it certainly adopted and followed the decision of the same Court in *Bolton Partners* v. *Lambert* (3), but it goes no farther. The case of *Mayor, &c., of Kidderminister* v. *Hardwick* (1) was cited but was not adverted to in the judgments of the Court.

From any decision of the English Court of Appeal I should of course not presume to differ. But I do not think that the cases there decided, to which I have referred, go farther than deciding that the ratification may supply the want of authority in the agent at the time of his acceptance. Therefore it must be shown in any such case that there was a contract purporting to be made by and with the agent which, if the agent had authority, would be a valid binding contract. Has that been done here? In my opinion it has not. Supposing that the agents here had the same authority to bind their principals at the time the document of the 25th May was signed, still there was no contract binding the plaintiffs, as there was nothing under the seal of the plaintiffs to give effect to it in the only way in which they could bind themselves. The agents had no authority under seal either original or retrospective. There was not therefore in my opinion any contract to be ratified. Then again there was no ratification under seal, which seems also a fatal objection.

It was also contended by the defendant that there was not independently of the want of the seal, a concluded and complete agreement, under the circumstances stated in the case, but I do not think I need go into this question, as I am with the defendant on the other grounds.

(1) L. R. 9 Ex 13. (2) 45 Ch. D. 16. (3) 41 Ch. D. 295.

I am unable to concur in the decision arrived at by the learned County Court Judge, and must therefore reverse his decree, and dismiss the Civil Bill with costs.

Solicitor for the plaintiffs: *Valentine Kilbride.*
Solicitor for the defendant: *Stephen J. Brown.*

D. M'C. M.

V.-C.
1895.
March 15, 27, 29.
April 18.
Appeal.
Nov. 6, 7, 8, 11.
Dec. 20.
V.-C.
1896.
Feb. 6.

THE EARL OF PEMBROKE AND MONTGOMERY *v.* WARREN.

(1895. No. 162.)

Lease—Covenant not to carry on certain businesses, "or any other offensive or noisy trade, business, or profession whatsoever"—Private hospital—Injunction—Practice—Change of parties—Costs.

A lease made in 1822 of a plot of ground on one side of Fitzwilliam-square (then partly built) in the city of Dublin, for the enclosing, ornamenting, and maintaining of which Square Commissioners had been appointed by Act of Parliament, contained covenants by the lessee to build dwelling-houses of a superior class according to the descriptions in the lease, and that the ground called Fitzwilliam-square should be preserved as a square and laid out as a pleasure ground only. It also contained a covenant not to use any part of the front of the house as a shop, or carry on therein or on any part of the demised premises the business of a tavern, ale-house, soap-boiler, chandler, baker, butcher, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, hatter, silversmith, coppersmith, pewterer, blacksmith, or any other offensive or noisy trade, business, or profession whatsoever.

A sub-lessee opened what the plaintiff called a private or home hospital, but what she described as a residence for herself and persons coming to town for medical advice or to undergo treatment. The Commissioners of the Square and the great majority of the residents objected to this and called on the head landlord to prevent it. On a motion for an interlocutory injunction, evidence was given that such a business would cause great annoyance and would be a source of danger to the other inhabitants of the square and would greatly depreciate the value of the property. Evidence for the defendant went to show that the only persons admitted were patients requiring surgical operations or to be treated medically, and who were sent by their own surgical or medical advisers; that persons suffering from infectious diseases were not received, and that there was no danger from infection.

Held, by the Vice-Chancellor, that the *ejusdem generis* rule did not apply, and that the concluding general words of the covenant were not to be confined to businesses of a similar nature to those enumerated; that in construing the covenant the nature and purpose of the letting, and the nature of the locality should be taken into account; that the word "offensive" had no definite legal meaning, that it was not to be restricted to what was unpleasant to the eye, ear, or nose, that it should be interpreted *secundum subjectam materiem*, and that it meant causing well-founded and reasonable annoyance. And the Court being satisfied on the evidence that the great body of the tenants of houses in the square were offended by the opening of the hospital, *held*, that there had been a breach of the covenant which should be restrained by an interlocutory injunction.

On appeal, *held*, by Sir P. O'Brien, L.C.J., and Walker, L.J. (Fitz Gibbon, L.J., *diss.*), that having regard to the locality, and to the circumstances under which the lease was granted, a private hospital was offensive within the meaning of the covenant.

Held, by FitzGibbon, L.J., that a private hospital was not necessarily, or *per se*, offensive within the meaning of the covenant, and that an interlocutory injunction ought not to be granted.

Pending the action the plaintiff died, and an order was made on the application of his devisee that the proceedings should be continued in the name of the latter. The defendants ultimately submitted to a perpetual injunction. The Vice-Chancellor, in awarding same with costs, *held*, that such costs should include those incurred prior to the death of the original plaintiff.

Motion for an interlocutory injunction. The action was brought by the Earl of Pembroke and Montgomery for an injunction to restrain the defendants, Graves Warren, Mary Shekleton and Elizabeth Perry, their agents and servants from carrying on, or permitting to be carried on, in the house and premises, 28 Fitzwilliam-square, in the city of Dublin, the business of a hospital, in breach of a covenant on the lessee's part contained in the lease under which the premises were held.

The lease was dated the 27th June, 1822, and by it the then Earl of Pembroke and Montgomery demised to Clement Codd, all that lot or piece of ground situate on the south-west side of Fitzwilliam-square, in the suburbs of the city of Dublin, and in the Manor of Baggotsrath *alias* Baggotrath, containing in front to said square 76 feet, in breadth in the rere 76 feet, and in the depth from front to rere 200 feet, over and above the breadth of the area which was to be 8 feet wide in the front of the houses that should be built on the said ground, and over and above the flagged passage which was to be 10 feet wide from the said area, mearing and bounding on the north-east by Fitzwilliam-square aforesaid, on the south-west by a stable-lane, which was to be 24 feet wide, on the north-west by ground in Lord Pembroke's hands, and on the south-east by another holding, leased to the said Clement Codd, as the same was set forth in the map thereunto annexed, for the term of 150 years at the yearly rent of £49 8*s.*, Irish currency; and Clement Codd covenanted that he would within the first two years of the term build on the entire front of the said lot, and fronting to Fitzwilliam-square, good and substantial dwelling-houses of the best materials, well roofed and covered with slates, not less than four stories high above the cellars at least, and should make an area of 8 feet wide in the front of said houses, and lay flags before the houses for a foot passage in the like manner as the same was then done before the houses in Merrion-square, and should pave the whole street before the front of said houses from the said flagged passage to the wall that enclosed the said square, and should enclose the said demised premises with a stone or brick wall within the first six months, and should trim the vaults to the front of said lot within the first twelve months of said term, or in default thereof the said Clement Codd should pay an additional yearly rent of £30. And that the front of the said houses should range in the line marked on the said map, and that no bow-window or other projections should be made in the front of the said houses beyond the window stools, and door cases, and that the area should be enclosed with a stone kerb with iron palisadoes on top ranging uniformly along the said intended square, and that the front of the said houses to the said square should be built of red stock bricks, and if the said houses and said area, passage, and pavement should not be built, fixed up, and made in manner aforesaid within the first two years the said Clement Codd would after the expiration thereof pay an additional yearly rent of £98 16*s.*, or that otherwise at the election of the Earl of Pembroke, &c., the demise should be void. Clement Codd also covenanted to insure against fire any houses that should be built on said premises, or in default to pay an additional yearly rent of £70, or that otherwise at the election of the Earl of Pembroke, &c., the demise should be void.

And further that the plot or piece of ground laid out on said map, called Fitzwilliam-square, should be preserved as a square, and that no building should be erected thereon during the demise, and that no cattle should be put on said ground, and that the said ground should be laid out as pleasure ground only, and ornamented in such manner as the majority of the tenants of said square should approve, and should be done at their own sole expense. "And further the said Clement Codd, for himself, his heirs, executors, administrators, and assigns, doth also covenant, promise, grant, and agree to and with the said Earl or the person or persons who may for the time being be entitled as aforesaid, that neither he the said Clement Codd, his heirs, executors, administrators, or assigns, nor any of them during the said term of 150 years shall employ or use any part of the front of the said house as a shop, or follow, or carry on, or permit, or suffer, to be followed or carried on, in the said house or on any part of the said demised premises, the business of a tavern, ale-house, soap-boiler, chandler, baker, butcher, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, hatter, silversmith, coppersmith, pewterer, blacksmith, or any other offensive or noisy trade, business, or profession whatsoever, and that on the breach of this covenant or any part thereof this present demise shall be utterly void to all intents and purposes, as if the same had never been made, or that otherwise at the election of the said Earl or the person or persons who may for the time being be entitled as aforesaid, the said Clement Codd, his heirs, executors, administrators, or assigns, shall forfeit and pay unto the said Earl of Pembroke, or the person or persons who may for the time being be entitled as aforesaid, from the time of the breach of the covenant, or any part thereof, whilst such trade or business shall be so carried on a further additional yearly rent or sum of £70 . . ."

By an Act 53 Geo. 3, c. clxxxv. (loc. & pers. 2 July, 1813), commissioners were appointed for making, enclosing, completing, improving, and ornamenting Fitzwilliam-square; and in order to provide a permanent fund for completing the enclosure and improvements, and keeping up and repairing the same, the houses and plots of ground on the sides of the square, as set out in a schedule, with the buildings then made, or thereafter to be erected thereon, were made chargeable with an annual payment to the commissioners according to the frontage of the houses or plots. The schedule showed that at the north side eleven houses had been erected, on the east side seven, on the south side none, and on the west side sixteen houses.

An affidavit of Fane Vernon, the plaintiff's agent, stated:—Clement Codd built three dwelling-houses on the plot demised to him—Nos. 27, 28, and 29, Fitzwilliam-square. The reversion was vested in the plaintiff, and the estate of the lessee in the defendant Graves Warren. The defendant Mary Shekleton was sub-lessee of the house No. 28, and she had recently sublet the same to her sister, the defendant Elizabeth Perry. Mrs. Perry had for several years occupied a house in Harcourt-street, Dublin, where she carried on the business of a private or home hospital for the reception of indoor patients, including surgical patients, and patients who were hysterical and needed restraint. On the 24th January, 1895, the deponent received a letter from Mr. Monahan, Q.C., the occupier of the house No. 29, Fitzwilliam-square, stating that No. 28 had been taken by a lady, who proposed to convert it into a private hospital, and calling his attention to the injury that would be caused to the plaintiff's property. A further letter stated that other residents in the square were willing to co-operate in endeavouring to prevent the said house from being converted into a hospital. The deponent thereupon communicated with the defendant Graves Warren on the subject, and he replied that this was the first intimation he had had of the contemplated conversion of No. 28 into a hospital, and that he also was of opinion that such conversion would injure the adjoining property; that the lady who had taken the house was Mrs. Shekleton, and that he had instructed his solicitors to write to her on the subject. On the 8th February the deponent received from the secretary to the Commissioners of Fitzwilliam-square a copy of a resolution passed at a special meeting of the Commissioners held on the 5th February, 1895, and which was as follows:—"That the Commissioners of Fitzwilliam-square, this day in duly summoned meeting assembled, having ascertained that the house No. 28 in the square is being prepared for conversion into a private hospital, hereby unanimously protest in the strongest manner against such a step, so injurious to the property of the inhabitants of the square, so prejudicial to their comfort and health, and to the enjoyment of the enclosure of the square, being permitted, and respectfully call upon the head landlord, the Earl of Pembroke, to take all necessary proceedings to protect the interests of his sub-tenants, the present occupiers of the square, as well as his own."

On the 16th February the deponent having heard that the house No. 28 was occupied, directed a rent-collector to make inquiry on the premises, and ascertained, through him, that the house had been opened as a private or home hospital by Mrs. Perry. On the 18th of that month he received a memorial signed by over forty residents in the square, tenants or sub-tenants of the plaintiff, stating that they believed that the carrying on of a hospital business in the locality would seriously depreciate the property, and gravely interfere with the enjoyment of the residences, and the right of user of the enclosure, which they had acquired under the belief that the houses in the square would be used for residential purposes only, and that they requested the plaintiff to exercise his right to prevent the contemplated injury being inflicted on the inhabitants of the square. Mrs. Shekleton, on being communicated with by Mr. Warren's solicitor, denied that she had let the house as a hospital. The plaintiff was owner in fee of all the houses in the square. The said houses had always been used as private residences, and occupied as such; and the deponent believed that if the defendants were permitted to carry on the business of a hospital, it would result in a considerable deterioration of the value of the house property in the square, and of all other residential house property in the immediate locality, and would detract in no small degree from the comfort and amenity of the private residences in or about the square. Under the rules made by the Commissioners of the square every occupier of a house was entitled as of right to a key giving access to the square garden or enclosure, and the deponent believed that if the said house continued to be used as a hospital, the patients when convalescent would be likely to use the garden for air and exercise, and this would be detrimental to the health and comfort of other residents. The former hospital of Mrs. Perry was, he was informed, one into which a general class of patients, including those with tuberculous diseases, and patients who were hysterical and needed restraint, was received; and as Mrs. Perry had closed that hospital, and transferred her furniture to 28 Fitzwilliam-square, he believed the same class of business would be carried on there. He believed that the business of a hospital necessarily entailed the resort thereto of physicians and surgeons, and the necessity of painful surgical operations, all of which would be regarded with distaste by the residents, and would deter people from purchasing or leasing house property in the square.

An affidavit of W. Lindsay stated, that on the 16th February, 1895, he visited No. 28, Fitzwilliam-square, the door of which was opened by a hospital nurse, who stated that the house was owned by Mrs. Perry, who had established a home hospital which was then in working order, with a staff of nurses in attendance.

Evidence was also given for the plaintiff by a considerable number of the residents in the square, many of whom had purchased leasehold interests in their houses, including testimony to the following effect:—All the houses in the square had hitherto been used as private residences only. If the business of a hospital were permitted to be carried on in number 28, it would cause extreme annoyance, and would interfere with the comfort of the other residences; it would be a source of danger to the inhabitants, and would very considerably depreciate the value of the property. Mrs. Perry, as a resident in the square, was entitled to a key of the gardens for the use of herself and the other occupants of her house; it would be impossible to prevent convalescent patients from using the square garden, and thereby coming in contact with the families of the other residents, many of whom would be debarred by the risk from using the gardens. In hospitals such as Mrs. Perry had conducted, patients requiring surgical operations and suffering from tuberculous diseases were admitted, and that would be a source of danger to the other residents and their children.

A servant in No. 29 deposed to having, on the evening of the 5th or 6th March, 1895, between 8 and 9 o'clock, heard loud screaming coming from No. 28, which continued for nearly three quarters of an hour. On the same night she was kept awake by loud and continuous coughing in the same house.

There were also affidavits by several medical men containing evidence of the following character:—In a private hospital cases are necessarily treated in which infectious diseases may develop; such hospitals are largely availed of by those suffering from tuberculosis of the lungs and other organs which class of disease is undoubtedly infectious; it is practically impossible altogether to exclude infectious cases—they might inadvertently, through errors of early diagnosis, gain admission, and this had been known to occur, or cases which appeared perfectly harmless when admitted might develop into smallpox, scarlet fever, or other infectious disorders of the most virulent type; tuberculous disease in particular not unfrequently results from other maladies which in their inception are apparently quite harmless; amongst the inmates of such hospitals might be females suffering from hysteria, which would be likely to be communicated to other women, especially young girls having any predisposition thereto; private hospitals are very frequently resorted to by patients about to undergo surgical operations as well as by ladies awaiting their confinement; both of these classes of patient must suffer very severe pain, unless put under the influence of an anæsthetic, and even then are often extremely noisy for several hours, and their cries must be heard in the houses immediately adjoining: it is difficult to detect insanity in its incipient state, and cases were known in which insanity had subsequently developed itself in patients who on admission to such an institution appeared to be perfectly sane; in many cases of serious illness delirium might be expected to set in, and patients in delirium shout aloud and make considerable noise. Mrs. Perry had carried on in Harcourt-street the business of a private general hospital for the treatment of all medical and surgical cases, which comprise all varieties of tuberculous (scrofulous) disease, which are known to be due to the presence of specific germs, and as such are undoubtedly and absolutely sources of danger to those coming in contact with patients convalescent from such diseases.

Evidence was also given by experienced house agents that the square had always been regarded as one of the most desirable situations for a private residence in the city; that the houses there had always commanded a high price attributable to its exclusive use for the purpose of private residences, and to the fact that the square garden had so much privacy and had been exclusively used by the inhabitants of the square. If number 28 were used as a hospital it would greatly reduce the value of the other houses.

The defendant Graves Warren deposed, amongst other matters, that he was in receipt of the rents of the three houses built on the ground demised by the lease of 1822. He considered that the conversion of one of them into a hospital would seriously deteriorate the value of the houses in the neighbourhood, and the value of his interest would be considerably reduced; be objected to any of the houses being used for such a purpose; the sub-lease under which No. 28 was held from him contained similar covenants to those in the lease from Lord Pembroke.

Mrs. Shekleton made an affidavit in which she stated that she purchased the interest in a sub-lease of the 10th March, 1837. The house No. 28 was then in a most unsanitary condition, and a positive source of danger to anyone inhabiting same, and even to the occupants of the adjoining houses; it had been unlet for some years, and was a source of depreciation to the property. She expended several hundred pounds in putting the premises into a perfect sanitary condition and in permanent improvements. She had not made any structural alterations or in any way adapted the house for use as a hospital. It was not true that Mrs. Perry carried on the business of a private or home hospital in Harcourt-street. She received in her house there patients who required surgical operations, or to be treated medically, who were sent there by their own surgical or medical advisers; but she never received any patients suffering from any infectious, tuberculous, or lung disease; her four children were living with her during the greater portion of her tenure of said house. She had had, and then had, people living with her who were in perfect health, and were not undergoing any medical treatment. There was no medical man attached to the said house, nor was there any nursing staff connected with it; the house in Harcourt-street could not be called either a private or home hospital, and Mrs. Perry purposed carrying on the house in Fitzwilliam-square on the same strict lines: the deponent admitted that she had been aware that Mrs. Perry intended to use No. 28, as she had done the house in Harcourt-street, but she denied that same was intended to be used as, or was, a hospital. There were what were called in the affidavits filed in the action private hospitals—three in the best residential part of Lower Leeson-street, one in Upper Fitzwilliam-street, one in Herbert-street, and one in Mount-street, all on the Pembroke estate, and no objection had been made to the continuance of same. She had heard that there was what was called a private or home hospital in Merrion-square. Fitzwilliam-square had been let by the predecessors of the plaintiff for building purposes, at ground rents, and no loss or diminution of income could be sustained by the plaintiff by the user of No. 28 in the manner intended.

Mrs. Perry deposed that she took No. 28 as a residence for herself and family, and for the purpose of taking in persons coming to town for medical advice, or to undergo treatment, and also persons not invalids and not requiring such treatment but in perfect health. It was untrue that she ever kept, and she never would keep, in her house any person suffering from tuberculosis, or any infectious or contagious disease, or requiring restraint. She had no intention of keeping, nor had she ever kept, in her house anyone who could be objectionable or dangerous to the health of the members of her family or others residing there. For the five years during which she occupied the house in Harcourt-street, nothing took place that could be disagreeable or cause annoyance to the adjoining occupiers, nor had she ever had any complaint on the subject. She had no staff of nurses in residence. There was then in the house, No. 28, one trained nurse engaged from, and for whom payment was made to, the Adelaide Hospital at a weekly rate, as in the case of any person who wanted the services of a nurse during illness. When additional nurses were required, the doctor attending the patient sent in a nurse selected by himself, or deponent procured one from the staff of some of the nursing establishments, and in either case the patient paid the nurse. There was no physician or surgeon attached to her house; each patient selected and paid his or her medical attendant, and Mrs. Perry was in no way responsible for the medical treatment of any person in her house. She did not admit any patient not sent by a doctor. No. 28 contained eight rooms furnished as bedrooms, two were reserved for herself and her household, and a third was occupied by a gentleman permanently residing with her, and who was in perfect health, leaving for the sleeping accommodation of guests or patients five rooms only.

Mrs. Perry, her daughter, and a nurse deposed that there had been no screaming in No. 28 on the evenings of the 5th or 6th March. The upper portion of the house had been unoccupied, save by the nurse, since the 2nd of that month.

Evidence was also given for the defendants by several medical men who had had patients from time to time at Mrs. Perry's house in Harcourt-street. They never heard of any case of infectious or tuberculous disease being treated there; if such had been the case they would not have sent patients there. They did not believe that any house, managed as hers was, could prove disadvantageous or dangerous to any neighbourhood.

A further affidavit was made by Mr. Vernon stating in reference to the private hospitals in Lower Leeson-street and Lower Mount-street, that neither of those localities had at all the same character as an exclusively residential neighbourhood that Fitzwilliam-square had hitherto possessed. Both the said streets contained several public-houses and grocers' and other shops, and there was in the former a female penitentiary and other religious charitable institutions. The deponent was not aware that there was then any private hospital in Merrion-square, and had not heard before reading Mrs. Shekleton's affidavit of the existence of such in Herbert-street. Strong complaints had in fact been made to him on the subject of the private hospital or home for patients in Fitzwilliam-street, upper. It was not until attention had been called to the existence of the institution in Fitzwilliam-square by Mr. Monahan's letter and the resolution and memorial, that the plaintiff was advised by counsel as to his legal position and rights under the covenant relied on and similar covenants in other leases.

Kenny, *Q.C.*, and *Meredith*, *Q.C.* (with them *Bowen*), for the plaintiff.

The Attorney-General (*The Mac Dermot*, *Q.C.*) (with him *F. Fleming*), for the defendant Mary Shekleton.

Serjeant Campion, Q.C. (with him *Ball*), for the defendant Elizabeth Perry.

Price, Q.C. (with him *John Murray*), for the defendant Graves Warren.

The Vice-Chancellor:—

April 18.

The injunction moved for is to restrain the defendants from carrying on, or permitting to be carried on, in the house No. 28, Fitzwilliam-square, the business of a hospital in breach of a covenant on the lessee's part in the lease of the 27th June, 1822, from the then Earl of Pembroke to Clement Codd. The lessor's interest in the premises is now vested in the plaintiff, and the lessee's interest in the defendant, Mr. G. S. Warren, of whom the other defendants are sub-lessees.

The covenant is in these terms. [His Lordship read the covenant.]

The questions are—first, What is the true construction of the terms of this covenant? and second, Whether there has been a breach of this covenant? In order to form a judgment of the construction of the covenant it is necessary to examine the language of the instrument and also the nature of the letting, as evidence of the intention of the parties to the lease. That this evidence is admissible and necessary to be taken into consideration is shown by the case of *Westropp* v. *Elligott* (1), which I had occasion recently to consider in the case of *French* v. *Taaffe* (2), where I held that the purpose of the letting, as shown by parol evidence, is a matter capable of proof by evidence of the nature of the holding, and is material for the purpose of showing what the mode of occupation in the minds of the contracting parties must be presumed to have been. Such evidence cannot, of course, be received to contradict the terms of the written instrument.

The circumstances of the property, the subject of the letting at the time the lease was made are of great importance. Lord Pembroke was the owner in fee of a large parcel of building ground in one of the best parts of the city of Dublin. He formed the plan of laying out and letting this ground as a square of private residences with an enclosure for a pleasure-ground for the inhabitants, and with that object he obtained a private Act of Parliament in the year 1813, which created and incorporated a body of Commissioners to be elected by the inhabitants of the houses in the intended square, and invested them with full powers for the management of the grounds intended to be inclosed, and for levying a tax on the inhabitants for the necessary expenses, and for the regulating their use of those grounds. All the leases for building the square were, I believe, in the same form as that in the present case, *mutatis mutandis.* The rents reserved were merely ground-rents, and the buildings were all to be erected by the lessees at their own expense. Up to the time of the execution of the lease several houses had been built on the plots demised by Lord Pembroke, but the square was not then completely built, especially at the south side on which the house in question is situated. The class of houses to be erected, as prescribed by the lease, was of a superior private dwelling-house. In carrying out a general plan like this it was a matter of great importance, both to the lessor and all his lessees, that the character of these houses should be maintained, and that the provisions of the leases should be so framed as to protect the lessees from acts likely to deteriorate the value of the property which they were bound to create by their large expenditure. Accordingly it may be presumed that the purpose of erecting and preserving a square of first class private residences was present to the minds of lessor and lessees. But the case does not rest there, for I think that this purpose is plainly shown by the frame of the lease in the present case. It was a lease for 150 years of that lot or piece of ground situate on the S.-W. side of Fitzwilliam-square, containing in front 76 feet, and in depth 200 feet, above the breadth of the area in front of 8 feet wide, bounded on the N.-E. by Fitzwilliam-square, at a rent of £49 8*s.*, Irish currency. It contained a covenant by the lessee within two years to build on the entire front good and substantial dwelling-houses of the best materials, well-roofed and covered with slates, not less than four stories high above the cellars; to make an area 8 feet wide in front of the said houses, and a foot passage in like manner as those in

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(1) 9 App. Cas. 815.

(2) Not reported. 1894—No. 714.

Merrion-square, and prescribes that the front of the houses should range in the line marked on the map annexed to the lease, and that no bow-window or other projections should be made in the front of the houses beyond the window-stools and door-cases, and that the area should be enclosed with a stone kerb, with iron palisadoes on top, ranging uniformly along the said intended square, and that the fronts of the houses should be built of red stock bricks. It has also a covenant that the plot or piece of ground laid out on the said map called Fitzwilliam-square should be preserved as a square, and that no building should be erected thereon during the lease, and that no cattle should be put on said ground, and that the said ground should be laid out as pleasure ground only, and ornamented in such manner as the majority of the tenants should approve, and should be done at their own sole expense. Then follows the covenant I have already read. A point was made on this covenant which I may now dispose of, namely, that the covenant as to employing or using any part of the front of the said houses as a shop, being conversant only with the *front*, impliedly permits shops to be kept in the rere, and that this disproves the inference to be drawn that it was the intention of the parties to limit the use of the premises to private residences. In the first place no question arises now as to any breach of this part of the covenant, and it is not improbable that any tenant doing so very unlikely a thing as opening a shop somewhere in the back portion of the holding might find he was not at liberty to do so. It seems more reasonable to suppose that the idea did not occur to the parties, who thought that such a thing was too unlikely to require to be guarded against by covenant. The entire nature of the instrument and the circumstances of the letting are to my mind so strong in favour of an intention to confine the use and occupation to private residences as not to be shaken by this argument.

The enumeration of the classes of business in terms prohibited does not expressly include that of hospital, and I do not think that any great reliance can be placed on the specifying of those of druggist and apothecary, having regard to the kind of hospital now in question. The case must therefore depend on whether it comes within the general words, "any other offensive or noisy trade business, or profession whatsoever." It was on this that the main controversy arose.

It may I think be fairly assumed that in the year 1822 no such thing existed, at least in Dublin, as a private hospital, and that it could not be expected that such a business should be expressly mentioned in the lease. The covenant is to be construed not only in reference to the houses which the lessee was bound to build, but as providing for all houses thereafter to be erected as part of the general plan of the lessor. It could not be foreseen what offensive or annoying businesses might possibly be introduced during the long term of 150 years, and it must have been the intention of the parties to prohibit all such from being established in the square. I agree in the contention that in addition to the enumerated businesses the covenant can be held to prohibit only offensive or noisy trades, businesses, or professions. I do not think there is evidence sufficient to show that the keeping the hospital now in question can be reasonably considered "noisy" within the description in the covenant, though it is very probable that noises of a distressing nature may sometimes, if not frequently, be heard by the immediate neighbours which certainly would not be conducive to comfort. The main stress of the plaintiff's argument was upon the word "offensive." It is now settled that a hospital is a business, even where it is carried on purely for charity and maintained out of private contributions. Such a question could not arise in a case like the present, where the business is not charitable but for private profit; a very legitimate and useful object but not a benevolent one.

Now as to the meaning of the word "offensive" in the covenant, the counsel for the defendants Mrs. Shekleton and Mrs. Perry, contend that it has a kind of technical meaning which they contended was conclusively settled by authority; they do not say what that meaning is, but what it is not; and they urged with much confidence that it has been held not to apply to a hospital. The case relied on for this proposition is that of *Tod-Heatly* v. *Benham* (1) and no doubt there is a dictum there of Cotton, L.J., which at first sight might appear to warrant the contention. The

(1) 40 Ch. D. 80

covenant in that case was not to carry on certain specified trades or businesses, or any other noisome, obnoxious, or offensive trade or business, nor to cause or suffer any act, matter, or thing, upon the premises which should or might be, or grow to the annoyance, nuisance, grievance, or damage, of the lessor or the inhabitants of the neighbouring or adjoining houses. The plaintiff there relied chiefly on the second branch of the covenant, and the case was decided by Kekewich, J., on that ground in his favour, but no such question is stated to have been mentioned in the argument before him, nor did he in his judgment decide or intimate an opinion that the first branch of the covenant was not also in the plaintiff's favour. On the appeal, counsel for the defendant argued that the case did not come within either branch of the covenant. Cotton, L.J. (p. 90) informed plaintiff's counsel that they only wished to hear him upon the question whether the hospital was an annoyance or grievance within the second part of the covenant to the lessor or the inhabitants of the neighbouring or adjoining houses. Again on p. 91, he says, "The covenant divides itself into two parts. The first part restrains the lessee from carrying on certain trades 'or any other noxious or offensive trade or business without the license of the lessor.' *The case does not come within that*, and I only refer to it for this reason, that it was contended that what was being done by the defendant was a *trade*, and that as it does not come within the express provision against such a trade he ought not to be restrained, although it does come within the words of the latter part of the covenant, and is 'an annoyance &c.,'" but he dissents from that contention of the defendant. No allusion whatever is made to this by the other Lords Justices. The head-note of the case does not advert to any question or decision on the point. It seems to me only to come to this, that the Lords Justices being with the plaintiff as to the effect of the second part of the covenant, did not think it necessary to decide whether it came within the first part or not, and that Cotton, L.J., for the sake of the argument assumed it did not. He surely would not have stopped the argument of plaintiff's counsel in support of its coming within the first branch of the covenant if he intended to decide the question against them upon it. I cannot therefore accept this as a decision upon the general question I am now

V.-C.
1895.

PEMBROKE
v.
WARREN.

dealing with. The case of *Tod-Heatly* v. *Benham* (1) is of great importance upon another question as to which I shall presently consider it.

It was next contended with much force by Serjeant Campion that the general words in the present covenant must be confined by the "*ejusdem generis*" rule to businesses of a similar nature to those previously enumerated. But this, though a general rule, is not to be applied to defeat the apparent intention of the parties to the instrument, and the context may readily show that the intention was to enlarge the enumeration and not to restrict the general words. It generally comes to be considered in cases where the instrument, whether deed or will, purports to convey several different species of property. I think the first thing to be ascertained is what is the genus and what are the species? The genus must contain the several species dealt with, and must therefore have some general attribute to which the essential differences are to be applied in order to ascertain the several species. It is logically that which has several species under it, a universal which is predicable of several things of different species, and which is considered the material part of the species of which it is predicated. In the present case I am at a loss to see what such general attribute is, short of, "offensive or noisy trade, business, or profession." The word "other" has been properly relied on as showing that all the trades, businesses, and professions enumerated are of an offensive or noisy species. The genus must be the offensive or noisy trade business or profession. There is nothing else in the nature of a general term or attribute which could comprehend so many different species which have nothing else in common. There is nothing else in common between, for instance, tavern and tanner, butcher and lime-burner, sugar-baker and hatter. In such a case it is difficult to see how these general words can be confined. That, too, is the grammatical sense of the words used; for in common parlance "any other offensive or noisy trade, business, or profession whatsoever" comprise every offensive business, &c., save those specifically enumerated. These rules of logic and grammar may no doubt be disregarded in favour of the intention, but it must be an intention clearly manifested by the language of the instrument construed with due regard to the nature of the instrument and the purpose for which it was executed. Lord Abinger, C.B., says in *Ringer* v. *Cann* (1), that the distinction in all these cases is whether the object of the parties was to pass a limited interest or not; that if it was to pass a limited interest then the rule is that we are not to construe general words so as to enlarge that limited interest. He and the other learned Barons held that the object of the parties shown by the nature of the instrument is the rule to be guided by in construing the general words. Now, what was the object of the parties here? It clearly was to protect as far as possible the houses in the square from being converted to any purposes which might be offensive to or might annoy the neighbourhood, and by that means depreciate its value at any future period when other tenants might be required. I take these words from the judgment of Lord Ellenborough in *Doe* d. *Bish* v. *Keeling* (2), where he was dealing with a covenant not to use or permit to be used upon the demised premises *any* trade or business, but they apply in principle equally to covenants like the present. It is most unlikely that the parties intended to exclude from this prohibition all trades, businesses, and professions which, though noisy or offensive in themselves and equally annoying to the inhabitants of the square, were not mentioned in the enumeration, or were not of a nature closely resembling those enumerated. It may be presumed I think that their intention was to guard against all such either by the special enumeration or the general words. For the reasons I have already stated I think it would be the same thing as striking out the general words altogether; for it would have been impossible to say with which of all these dissimilar species they were to be linked.

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(1) 40 Ch. D. 80.

The chief support of this argument was the case of *Withington Local Board of Health* v. *Corporation of Manchester* (3) which was confidently cited as decisive upon this very question. The question arose as to the erection of a smallpox hospital by defendants on their own land but within the jurisdiction of the Withington Board of Health. The Board of Health rested their case on the provisions of the Public Health Act, England, 1875, which is an Act divided into parts dealing with different subjects, and each part is again subdivided into groups of sections, each group having a separate heading stating the subject to which it applies. One of these groups commencing with section 112 is headed "Offensive Trades," and provides that any person who establishes within the district of an urban authority without their consent in writing "any offensive *trade*, that is to say, the *trade* of"—then follows an enumeration of some offensive trades, and then come these words "any other noxious or offensive trade, business, or manufacture," —shall be liable to a penalty.

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(1) 3 M. & W. 343, 347. (2) 1 M. & S. 95. (3) [1893] 2 Ch. 19.

The next of these groups begins with section 120 and is headed "Infectious Diseases and Hospitals," and at section 131 is a sub-heading "Hospitals" which gives powers to any local authority to provide hospitals. The plaintiffs contended that the erection of a smallpox hospital by the defendants within the jurisdiction of the plaintiffs, the Local Board, was an offensive trade within section 112 and the other sections in that group; and that they had accordingly a right to prevent this as their consent had not been obtained. The rule of "*ejusdem generis*" was relied on amongst other grounds by the defendants as limiting the "offensive trades" group to trades of a similar nature to those enumerated; but the case was decided by Chitty, J., on the general construction of the Act which was elaborately reviewed by him, and his decision was affirmed on the same grounds by the Court of Appeal. It was a clear case for applying the rule, but it does not decide any such general principle as it was pressed upon me for.

I am of opinion that the "*ejusdem generis*" rule does not apply to the present case. I must therefore decide it upon the construction of the covenant, and in considering this I must take into account the general circumstances I have mentioned.

It is well settled that in these cases the words of restrictive covenants must be construed according to the nature of the transaction, and especially upon the nature of the locality. What would not be offensive, noisome, or annoying, in one locality may be so in another. This was laid down by Lord Chief Justice Tindal, in *Gutteridge* v. *Munyard* (1), where he

(1) 7 C. & P. 129.

says that the construction of such covenants must depend much on the situation of the property, and that the jury ought to make all fair allowances without straining the construction of the covenant, and that with respect to the construction of the covenant it was particularly worthy of consideration whether any such trades were carried on upon the premises at the time of the granting of the lease. It is evident that he meant by the last observation that if it be shown that any similar trades were then carried on upon the demised premises, or in their neighbourhood, it would go to exclude from the operation of the restriction any trades so carried on. Now here it is not alleged, nor could it be shown, that any such business as that sought to be restrained, or any similar business was carried on in the locality in question. The case of *Jones* v. *Thorne* (1) does not throw much light upon the question, as it was a question sent from Chancery on a case stated, and, as was then the rule, no reasons were stated by the Court of Law for their decision. It was, however, argued on the ground that it was not stated in the case whether the opening of a public-house was an annoyance to the neighbouring tenants; that whether it was so or not must depend mainly on the character and condition of life of those tenants, for a public-house might be a nuisance in one situation, and a convenience in another, and that there was nothing stated in the case from which the Court could collect that the opening of that public-house was any annoyance to the other tenants. To this Holroyd, J., appears to have assented, for he said that the Court was bound to consider the case as if it were an ejectment for the forfeiture, and that at the trial the plaintiff had proved only the granting of the lease, and that a public-house had been opened upon the premises, and the certificate was in terms limited to this state of facts. From this it would appear that a different conclusion might have been arrived at if the nature of the locality were shown upon the case, or annoyance to the neighbouring tenants had been proved. In several other cases the difference in situation has been considered in reference to the construction of such covenants, and I shall only refer to the observations of Thesiger, L. J., in delivering the judgment of the Court of Appeal, in *Sturges* v. *Bridgman* (1) where he says (p. 865), that whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances; and that what would be a nuisance in Belgrave-square, would not necessarily be so in Bermondsey. Common sense is in favour of this distinction, and I think it could not be contended that for instance a rag-store or a slaughterhouse, or rooms let as tenements to weekly lodgers, would not be a nuisance, or noxious, or offensive, or an annoyance in Fitzwilliam-square or Merrion-square, though these businesses might not be so in a different locality.

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(1) 1 B. & C. 715.

Then what is meant by the word "offensive"? It literally means what causes offence, which I take to be equivalent to annoyance, that is well founded and reasonable annoyance. To whom is it to be offensive? In the first and principal place, to the other tenants of the estate, who took their leases and expended their money in building private residences on the faith of the intended character of the square being preserved, and for whose benefit mainly this restrictive covenant was inserted. The evidence in this case is conclusive that the great body of the tenants of houses in the square are offended by the opening of this hospital; indeed there seems to be but one dissentient. "Offensive" has not, in my opinion, any definite legal meaning, any more than "annoyance" or "grievance," and it must be interpreted "*secundum subjectam materiem.*" I know of nothing, in either law or common parlance, to restrict it to what is unpleasant to the eye, or ear, or nose.

In *Doe* d. *Bish* v. *Keeling* (2), which I have already mentioned, it was held that opening a boys' school was a business within a covenant against keeping any trade or business upon demised premises, and a breach of the intention of the lessor that the house should not be converted to any purpose which might be likely to annoy the neighbourhood or depreciate the value; and that though this species of business had not been prohibited in express words, the general words were sufficient. In *Kemp* v.

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(1) 11 Ch. D. 852. (2) 1 M. & S. 95.

Sober (1) Lord Cranworth held that the keeping of a girls' school was a breach of a covenant not to carry on any trade, business, or calling whatever on the premises, or otherwise use the same to the annoyance or injury of any of the houses in the neighbourhood.

In *Bramwell* v. *Lacy* (2), which comes nearer to the present case on this question of being offensive, there was a covenant not to carry on upon the demised premises any trade, business, or dealing whatsoever, or anything in the nature thereof, or to suffer any act or thing which might be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises. The assignees of the lessee opened a hospital for diseases of the throat and chest for poor persons, free to the poor, and mainly supported by voluntary contributions; but several of the patients made small payments according to their means. The neighbours complained both on the ground of depreciation in value of their property on account of the proximity of the hospital, and also of its being a source of danger to their health. Sir G. Jessel held that the hospital was a business within the meaning of the covenant, and also that it was shown upon the evidence that the persons in the neighbourhood had suffered annoyance, inconvenience, and injury, and that the possible danger from infection was a matter of which they had a right to complain, and he granted an injunction. That case of course differs from the present both as to the form of the covenant, which was in larger terms than those here, and also because the hospital was a public one, and did not profess to exclude infectious cases. But it is important as showing that opening a hospital is a breach of a restrictive covenant, though not expressly mentioned, and that the reasonable complaints of the neighbours that it was a source of danger to the health of the neighbourhood, though no case was proved to have occurred where infection had been communicated, were grounds for an injunction.

But the case that comes nearest to the present is that of *Tod-Heatly* v. *Benham* (3), which I have already referred to on another point. There a hospital for out-door patients for throat, skin,

(1) 1 Sim. (N. S.) 517. (2) 10 Ch. D. 691. (3) 40 Ch. D. 80.

and other diseases, had been opened on premises held under a lease containing a covenant against the carrying on upon the premises of a number of specified trades or businesses, or any other noisome, obnoxious, or offensive trade or business, or doing, or suffering to be done, any act, matter, or thing upon the premises which should be or grow to the annoyance, nuisance, grievance, or damage of the lessor, or the inhabitants of the neighbouring houses. The evidence was of a conflicting character—that for the plaintiff to prove that the locality was a valuable residential quarter, and that the establishment there of a hospital was seriously depreciatory to the neighbourhood, and had reduced its value for letting purposes; and that for the defendant to prove that there was not the slightest risk of infection; that no patients suffering from infectious or contagious diseases had attended the hospital, and that there was no crowding or loitering of patients attending the hospital; and that the houses in the immediate neighbourhood were by no means of a high class character, being small shops and worse. The Court affirming the decision of Kekewich, J., who held that the hospital was an annoyance or grievance, stated their views on this subject as follows:—[His Lordship referred to the observations of Cotton, L.J., at pages 89 and 93, and to the judgments of Lindley, L.J., and Bowen, L.J., at pages 96 and 98.]

In the present case we have the affidavits of some gentlemen who are inhabitants of the square, and who are sensible men, and unlikely to be led away by fancies, Mr. Monahan, Q.C., Master Courtenay, Mr. Goulding, Mr. Wm. Findlater, and Mr. R. H. Beauchamp, and of Drs. J. W. Moore and J. H. Scott, and they all agree in the opinion that the keeping of this hospital would seriously depreciate the value of the houses in the square, and seriously tend to diminish the material comfort and pleasurable enjoyment of their residences therein, besides deteriorating in no small degree the property of all those who have any interest in the houses whether as owners or occupiers. They also prove that there exists a strong feeling of annoyance among the inhabitants as to the change likely to be effected in the residential character of the square, which was one of its principal attractions. Some of them also prove the existence of a fear of infection, as to which as

V.-C.
1895.
PEMBROKE
v.
WARREN

observed by Cotton, L.J., in *Tod-Heatly* v. *Benham* (1), it is not necessary to prove absolute danger or risk of infection, in order to show that there has been reasonable ground for annoyance or grievance. A number of affidavits have been made for the defendants by physicians and surgeons who have been in the habit of sending patients to a private hospital in a house in Harcourt-street, lately kept by the defendant Mrs. Perry, the business of which she has removed to the house in Fitzwilliam-square, with the object of proving the impossibility or extreme improbability of infection resulting from this hospital in Fitzwilliam-square, their opinion being mainly based upon the entire freedom from infectious disease in the hospital in Harcourt-street, and upon the care taken by physicians and surgeons sending patients there to guard against persons suffering from any infectious disease being taken in there, and the care and vigilance of Mrs. Perry, to whose admirable conduct of her hospital all have borne testimony, and her rule that no patient is received there unless sent by a physician or surgeon. But giving all due weight to these considerations there has been a good deal of evidence that no possible care or caution can guard against cases, not apparently infectious even to most skilful practitioners, developing into what is infectious. When such eminent authorities as Dr. C. Ball, Surgeon Wheeler, and Dr. John Wm. Moore entertain this opinion, even if they were wrong in thinking that there is risk, still it shows that it is not unreasonable for unskilled persons to think so too, and this amounts to an annoyance, or what is in my opinion equivalent to annoyance, "offensive." An observation may be made upon the laudatory opinions as to Mrs. Perry's good and careful management of such a business that it is a safeguard entirely personal, and that if for any cause she ceased to be the proprietor and manager of the hospital, and it got into other hands, there is no certainty of such management being continued in the hands of her successor. If such an institution were once permitted, it would open the door for others being set up in the same locality, and the private residential character of the square might thus be completely destroyed. I place much reliance on the affidavit of Mr. Findlater who has had a very large experience in the management of Dublin hospitals, to which he has devoted gratuitously much time and attention, and his experience goes with the statement of the doctors who have made affidavits for the plaintiff. There is also an important statement formed from personal experience in the affidavit of Mr. Battersby, one of the house agents, proving the depreciation of the property which I shall read:—"I am aware from what has occurred to my own knowledge in the working of such home hospitals, that although they may be originally intended for the reception of non-infectious patients, the risk of the outbreak of an epidemic in such a hospital is considerably greater than in a private house, and that the immediate vicinity of such a hospital is shunned on that account alone by persons in choice of residences."

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(1) 40 Ch. D. 80.

I make allowance for the mistaken opinion of some of the plaintiff's witnesses that tuberculous diseases were received by Mrs. Perry, which it now appears are not knowingly received, but still I think there is enough to show grounds for reasonable men entertaining fears of serious risk. It seems to me that it is impossible to separate such fears from the idea of even such a hospital. Nor can I say it is unreasonable to connect these fears with the use of the gardens of the square, where convalescent patients and nurses in attendance on cases must have access. It was suggested by defendants' counsel that any inconvenience in this respect might be met by enacting new bye-laws by the Commissioners, but in the first place there has been no proof of any power to do so, and even if there is it is going rather too far to suggest that new bye-laws should be made by the Commissioners to meet the views of an individual householder, who desires to set up an institution of the kind for the purposes of private profit.

But in order further to prove that the establishment of this hospital is offensive to the householders and inhabitants, the plaintiff has relied on two very important documents, one dated the 5th of November, 1895, being a resolution by the Commissioners of the square in these terms. [His Lordship read the resolution.]

The other is a memorial sent to the plaintiff's agent on the

18th of February, 1895, signed by forty-seven inhabitants of the square in these terms. [His Lordship read this document.]

The signatories to this memorial are some of the most respected inhabitants of Dublin, and great weight is due to their objections, which are not based on fanciful grounds, but on the interference with their enjoyment of their residences and pleasure grounds, and the serious depreciation of their property.

In this latter view they are supported by the evidence of two of the most experienced and skilful house-agents in Dublin, Messrs. North and Battersby.

The cases admittedly received into Mrs. Perry's hospital include all surgical operations, confinements of ladies, and all non-infectious medical cases. Nervous and hysterical patients are received without restriction. These patients must have their medical or surgical attendants, and also, in most cases, trained nurses. I cannot wonder at the other inhabitants objecting to all this as offensive.

The defendants objected to this business being called a hospital, and this position was taken up by Mrs. Shekleton in her letters to Messrs. Hone and Falkiner of the 29th of January and the 8th of February. It makes no difference what it is called: whether a home hospital, a private hospital, or a boarding-house for patients who take up their abode there for surgical operations, for medical treatment, save for infectious diseases, and for the confinement of ladies. To my mind a boarding-house of this class is a hospital in the ordinary acceptation of the word. I cannot see that it makes any material difference as regards this whether patients are sent there by their medical or surgical advisers, or by admission on the orders of subscribers, nor whether the trained nurses to attend on them are provided by the proprietress directly, or engaged from public hospitals or nurses' residences. The question is what the business is, not what it is called.

On a full and careful consideration of the whole of this case I am of opinion that the act of the defendants Mrs. Shekleton and Mrs. Perry, in setting up this hospital is a breach of the covenant in the lease, and should be restrained by injunction.

It was contended that this is not a case to grant an interlocutory injunction, that it is a *quia timet* proceeding, and that no damage has been actually sustained. I do not concur in this view. It is an action for breach of a covenant which I hold to have been broken by the defendants. It is not a *quia timet* proceeding, and actual damage has been sustained by that breach. When the course of action taken by Mrs. Shekleton and Mrs. Perry is considered, it will be found that they have no reason to complain, for they had not only notice of the covenant, but they had also express warning before their arrangements were concluded, of the existence of the objections now put forward. There can be no doubt that they were acting in concert and with a view of using the house as a private hospital, and of the annoyance it afforded to the inhabitants of the square, and still they persevered in their project. On the 27th January Mrs. Shekleton received the letter of Mr. Warren's solicitors warning her of the objections. She was of course aware of the existence of the restrictive covenant, and she repeated it verbatim in her lease to Mrs. Perry. She admits she was aware of the purpose for which the house was intended to be used by Mrs. Perry. She wrote to Mr. Warren's solicitors on the 29th January, in reply to their letter, denying that she had let the house as a hospital, a statement that I presume she thought herself justified in making on the interpretation put by her on the term, in which I cannot agree. She repeated this statement in her letter to them of the 3rd February. On the 2nd February, Messrs. Barrington & Son wrote to Mrs. Perry on behalf of inhabitants of the square, fully apprising her of the annoyance caused by opening this house as a private hospital, and the intention to take proceedings to prevent it; but to that letter no reply was given. On the 12th February the Secretary of the Square Commissioners wrote to Mrs. Shekleton, enclosing a copy of their minute on the subject. It was not until the 14th February that the lease from Mrs. Shekleton to Mrs. Perry was executed. The conveyance of the leasehold interest to Mrs. Shekleton was not produced by the defendants, so that I am unable to see when it was executed. On the 16th February the house was opened as a hospital, and the business previously carried on by Mrs. Perry in Harcourt-street was removed there. It is not, as was contended, the case of interference with an owner exercising proprietary rights in property already in his possession, but of persons acquiring property for the purpose of doing the acts now complained of, with express notice of the covenant on the subject in the lease.

I shall therefore make an order for the injunction prayed for till the trial of the action, and upon the usual undertaking of the plaintiff to abide any order the Court may make as to damages. I shall also order that the injunction shall not come into operation till the 1st June, in order to give the defendants the opportunity of taking the opinion of the Court of Appeal, if they shall desire to do so, or, if not, to give the defendant Mrs. Perry time to make other arrangements for carrying on her business.

I reserve the costs of this motion.

On the 23rd April, 1895, the defendants Mrs. Shekleton and Mrs. Perry served notices of appeal.

On the 3rd May, 1895, the plaintiff died, having devised his said Dublin property, after prior estates which did not take effect, to the Hon. Sidney Herbert in tail male, and appointed him and Edward Walter Hamilton executors.

On the 15th May, 1895, the Vice-Chancellor made an order that all further proceedings in the action should be carried on and prosecuted by the said Sidney Herbert, the then Earl of Pembroke and Montgomery against the defendants in like manner as same would have been carried on and prosecuted by the late plaintiff against the said defendants if the said plaintiff had not died.

Probate of the will was subsequently granted to the said executors.

D. M'C. M.

Appeal.
1895.
PEMBROKE
v.
WARREN.
Nov. 6, 7, 8,
11.

Serjeant Campion, Q. C., The Right Hon. The Mac Dermot, Q. C., Frederick Fleming, and *W. P. Ball,* for the appellants (1):—

The covenant is one sentence in two parts, and must be construed as a whole: *Withington Local Board of Health* v. *Corporation of Manchester* (2); Maxwell on Statutes, p. 405. The case comes within the rule of *ejusdem generis,* and the general words must refer to a trade or business of a similar nature to those enumerated. "Offensive" must mean offensive *per se* taken in connexion with the enumerated trades. A private hospital is not offensive *per se*: *Tod-Heatly* v. *Benham* (3); see the judgment of Cotton, L.J., p. 91. In *Wanstead Local Board of Health* v. *Hill* (4), the trade of "brick-making" was held not to be within the general words, as it was not analogous to those specified. In *Fleet* v. *Metropolitan Asylums Board* (5), the establishment of a smallpox hospital was held not to be a nuisance. In *Cleaver* v. *Bacon* (6) it was held that the trade of a butcher was not offensive, *per se,* having regard to the enumerated trades. See also *Rapley* v. *Smart* (7), which was the case of a slaughter-house. In *Holt* v. *Collyer* (8) there was a covenant against certain enumerated trades, and among others, a beer-house, and it was held that a beer-shop was not a violation of the covenant. No doubt the surrounding circumstances of the locality must always be considered: *Gutteridge* v. *Munyard* (9); *Sturges* v. *Bridgman* (10); but the user and mode of occupation must also be considered. On the evidence of the doctors, this is not offensive, as no patients suffering from infectious or contagious diseases are admitted, and no patients are admitted without a statement from a doctor that they are free from contagion or infection.

It is not a case for an interlocutory injunction, as to obtain that the breach must be clear, and the acts to be enjoined must be necessarily a breach of the covenant: *Tipping* v. *Eckersley* (1); *Wilkinson* v. *Rogers* (2). In *Doe* v. *Bird* (3) there was a covenant against certain enumerated trades or businesses, or any offensive trade, and the lessee having opened a private lunatic asylum, it was held not to be a breach. Payment is not a necessary element to constitute business: *Rolls* v. *Miller* (4).

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(1) In the Court of Appeal, before SIR PETER O'BRIEN, L.C.J., and FITZGIBBON and WALKER, L.JJ.

(2) [1893] 2 Ch. D. 19.

(3) 40 Ch. D. 80.

(4) 13 C. B. (N. S.) 479.

(5) 2 *Times*' Rep. 361.

(6) 4 *Times*' Rep. 27.

(7) 10 *Times*' Rep. 174.

(8) 16 Ch. D. 718.

(9) 7 C. & P. 129.

(10) 11 Ch. D. 852.

The plaintiff must show this to be actionable within the covenant: *Walter* v. *Selfe* (5); *Wanstead Local Board of Health* v. *Hill* (6).

Kenny, *S.G.*, *Meredith*, *Q.C.*, and *Cole-Bowen* for the respondent:—

We base our case on two matters—(1) It is an interference with the enjoyment and amenities of their residences by the other inhabitants of Fitzwilliam-square; (2) the opening of this hospital would depreciate the value of the property.

In construing a covenant you must look to the surrounding circumstances: *Mullally* v. *Walsh* (7); *Gutteridge* v. *Munyard* (8); *Sturges* v. *Bridgman* (9). What might be an annoyance in one locality might not be so in another. From the private Act of Parliament of 1813, under which Fitzwilliam-square was built, it is manifest it was intended to be a place for residences. The terms of the lease of 1822 carry this out farther, and a private hospital there would be a breach of this covenant. This case is the converse of *Doe* v. *Bird* (3). Moreover it is the locality and state of the surrounding circumstances at the date of the lease that must be taken into account: *Proudfoot* v. *Hart* (10). *Withington Local Board of Health* v. *Corporation of Manchester* (11) does not apply, because that case turned on the section of an Act of Parliament. *Tod-Heatly* v. *Benham* (12) was decided on the second branch of the covenant in which the hospital was obviously included. The statement of Cotton, L. J., which has been relied on is a *dictum*, and

(1) 2 K. & J. 264.
(2) 2 De G. J. & Sm. 62.
(3) 2 A. & E. 161.
(4) 27 Ch. D. 71.
(5) 4 De G. & Sm. 315.
(6) 13 C. B. (N. S.) 479.
(7) 3 L. R. Ir. 244.
(8) 7 C. & P. 129.
(9) 11 Ch. D. 852.
(10) 25 Q. B. D. 43.
(11) [1893] 2 Ch. 19.
(12) 40 Ch. D. 80.

not a decision, and each of the trades mentioned there was noxious *per se.*

In *Hickman* v. *Isaacs* (1) there were no enumerated trades, and the case is no authority on the doctrine of *ejusdem generis.*

A hospital is a business within the meaning of the covenant: *Bramwell* v. *Lacy* (2). See the judgment of Jessel, M.R., in *Portman* v. *Home Hospital Association* (3). In all the cases in which the Courts have held, in construing a restrictive covenant, that offensive means offensive *per se*, the case has been so clear that the Courts could not hold otherwise.

The general words here must enlarge the *genus*, coming as they do after such a large enumeration. "Offensive" has no defined legal meaning, and you can only ascertain its meaning in any particular case from the surroundings. Here it means offensive not only to the senses, but also to the minds and pockets of the neighbours. The Court will not narrow the meaning of "offensive," unless there is something in the deed to restrict it: *Anderson* v. *Anderson* (4).

Dec. 20.

SIR PETER O'BRIEN, L. C. J.:—

This appeal involves a question of very considerable importance and of very general interest. That question is whether one of the houses in Fitzwilliam-square in this city can, having regard to the terms of the lease under which it is held, be used as a private hospital, without the consent of the head landlord, and against his will. The exact nature of that hospital I shall have to advert to in some detail at a later stage of my judgment. The words of the covenant, which has been introduced into the lease with a view of regulating the use of the house in question, are as follows:—"The said lessee for himself, his heirs, executors, administrators, and assigns doth covenant, promise, grant, and agree to and with the said Earl, or the person who may for the time being be entitled as aforesaid, that neither he the said lessee, his heirs, executors, administrators, or assigns, nor any of them, during the said term of 150 years, shall employ or use any part of

(1) 4 L. T. (N. S.) 285.
(2) 10 Ch. D. 691.
(3) 27 Ch. D. 81.
(4) [1895] 1 Q. B. 749.

Appeal.
1895.
Pembroke
v.
Warren.
Sir P. O'Brien,
L.C.J.

the front of the said houses as a shop or follow or carry on or permit or suffer to be followed or carried on in the said houses or on any part of the said demised premises the business of a tavern, alehouse, soap-boiler, chandler, baker, butcher, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, hatter, silver-smith, copper-smith, pewterer, blacksmith, or any other offensive or noisy trade, business, or profession whatsoever." These are the words of the covenant, and upon its true construction the determination of the question before us depends. How then are we to determine the meaning of the covenant? In construing any clause or covenant in an instrument, we must have regard, not merely to the words used, but to the subject matter dealt with, and the object that the parties to the instrument had in view. We must, in construing an instrument, have regard not merely to the language of a particular covenant, but to the general scope and object of the instrument dealt with as a whole. If authority were wanted for this I might refer to Platt on Covenants. That very learned writer states at p. 136 of his excellent treatise as follows:—"In construing covenants the fulfilment of the evident intent and meaning of the parties is the design of the Courts of Law and Equity. They do not confine themselves within the narrow limits of a literal interpretation, but taking a more liberal and extended view, contemplate at once the whole scope and object of the deed . . . The first general principle is that covenants shall be so expounded as to carry into effect the intention of the parties. This intention is not to be collected from the language of a single clause in the deed, but from the entire context." To the same effect is the language of Lord Justice Lindley and Lord Justice Cotton, in the case of *Rolls* v. *Miller* (1). It is quite plain then that, in construing the covenant before us, we must have regard to the general scope of the instrument in which it is contained, and the object of the parties to that instrument. What was that object? To my mind that object was plainly this—to form a square with private residences, and a pleasure-ground for the recreation and benefit of the inhabitants of those residences, and to preserve and maintain

(1) 27 Ch. D. 71.

the residential character of the square. That this was the object which was contemplated by the parties to the lease is obvious. We may refer to the circumstances under which the lease came to be executed. The predecessor in title of Lord Pembroke had in 1813 obtained an Act of Parliament for enclosing, lighting, and improving Fitzwilliam-square. By that Act, after reciting that a considerable number of the inhabitants and proprietors of the several houses and grounds surrounding the square had signified their earnest wish that the square should be properly enclosed and lighted, and the inside thereof improved and ornamented for the convenience and comfort of the several inhabitants thereof, it was enacted that a certain number of gentlemen, whose names were given, should be appointed and constituted Commissioners for making, enclosing, completing, improving, and ornamenting the square, and for otherwise carrying the Act into effect.

There was provision made for the appointment of new Commissioners in place of those who died or retired, and it was made a necessary qualification of a Commissioner that he should be the owner or inhabitant of a house in the square, and for carrying the Act into execution the owners and inhabitants of the houses in the square were made liable to a certain tax leviable by distress. There are various other provisions in the Act which it is unnecessary to refer to, but it is to be observed that the Act of Parliament, embodying all the various provisions which I have mentioned, was passed for the convenience and comfort of the residents in the square. Those residents were to bear the burden of taxation, and were to enjoy the advantages which that taxation was supposed to secure.

This then was the object of the Act of 1813. I now come to the lease, which comprises the covenant we have to construe, and which was made by the self-same Earl of Pembroke who procured the Act of Parliament, to the main provisions of which I have referred. That lease was made in 1822 by the then Earl of Pembroke to Clement Codd. The lessor's and lessee's interests respectively are vested in the plaintiff and the defendant Warren, the defendants Mrs. Shekleton and Mrs. Perry being sub-lessees. The lease is a building lease, and contains very elaborate provisions as to the character of the house to be built. The Vice-

Chancellor in his judgment refers to them at considerable length. These provisions provide for the erection of two superior private residences. It is admitted the leases under which the other houses in the square are held, are identical in their provisions. These provisions provide for uniformity of character in the buildings and for identity of situation relatively speaking, that is to say, they are not to project beyond a certain line of demarcation, and then follows a provision that no cattle shall be put on the enclosed ground, and that the said ground shall be laid out as pleasure ground only, and ornamented in such manner as the majority of the tenants in such square shall approve, and shall be done at their own sole expense. Next we have the covenant, which I have already read. Now then, taking the circumstances under which the house was contracted to be built, the antecedent Act of Parliament, and the lease of 1822, which comprises the subject of letting, it is plain that the object aimed at was to make the houses in the square private residences, and to maintain and preserve them as such, and also to make the enclosed ground a pleasure ground for the inhabitants of the square, and to preserve and maintain it as such. The much discussed provision as to where a shop might be, viz. in the rere of the premises, emphasizes I think the intention to preserve the residential character of the house and square. This was the object of the deed, and with a view of securing this object, the covenant upon which the controversy arises was introduced. On the defendants' behalf it is argued that a private hospital is not within the prohibition of the covenant on two grounds, namely, that a hospital is not *ejusdem generis* with the trades and businesses specified, and that it is not an "*offensive*" business. It is admitted to be a "business," but it is argued that it is not an "offensive" one. With reference to the first point, as to the rule which is known as the rule of *ejusdem generis*, I am not at all sure that the business of a hospital is not *ejusdem generis* with the business of an apothecary, which is mentioned in the covenant; but admitting that the carrying on of an hospital and the business of an apothecary are not *ejusdem generis*, still I think this does not determine the question before us, as, in my opinion, the rule of *ejusdem generis*, as commonly understood, does not apply in the present instance. It cannot be too clearly pointed out that counsel for the defendants proceeded to the extreme length of contending that a smallpox hospital would not be within the prohibition of the covenant, that in fact for aught the covenant did, Mrs. Shekleton might establish to-morrow a smallpox hospital in Fitzwilliam-square, and that no authority could be derived from the language of the covenant to restrain her. This in my opinion is an extreme proposition unsustainable in point of law. The rule as to *ejusdem generis* yields to the general intention to be collected from all parts of the deed; and in my opinion, having regard to the heterogeneous and miscellaneous character of the trades and businesses enumerated, and to the plain object of the deed that private residences should be erected and maintained, what the covenant intended to do was this, viz. to make the test of what was prohibited the attribute of noise or offensiveness, and not to enumerate a class with a view of limiting the prohibited trades and businesses to such as should be *ejusdem generis* with those enumerated.

Assuming that a private hospital is not *ejusdem generis* with what are enumerated, if the strict rule of *ejusdem generis* was applied the plain intention to maintain the private residential character of the houses to be collected from all parts of the deed would be easily defeated. There are certainly instances of trades and businesses which are not *ejusdem generis* with those named, but which are noisy and offensive, and the carrying on of which would be immediately destructive of the residential character of the neighbourhood. I have already instanced a smallpox hospital, which, according at least to the contention of the defendants, is not *ejusdem generis* with the trades and businesses enumerated in the covenant. A smallpox hospital would be offensive in the last degree, and yet according to the argument of the defendants' counsel would not be within the prohibition of the covenant. What is aimed at by the covenant is in my opinion any trade or business whatever, whether analogous to those specified or not, which is noisy or offensive. What then is the meaning of the word "offensive" in the particular covenant? If I consult Webster's Dictionary I find that the word "offensive" means giving pain or unpleasant sensations"—"causing injury"; but if I must regard, and I think I am bound to do so, the collocation of the word in this instrument and the object of its introduction, it would appear to me to reach any business, which would be so annoying and hurtful as materially to diminish the comfort and enjoyment, and thereby the value, of the residences in the square—any business in fact that would produce such a sense of discomfort as prejudicially to affect the residential character of the square and the value of the property and houses therein.

As I have already stated, I infer this to be the meaning of the word "offensive" from the general intention and object of the parties to the lease, looking at it as a whole, from a consideration of the particular object with which this restrictive covenant was introduced, which was to enforce the general intention and object of maintaining the private residential character of the square, and also from its collocation with the word "noisy," and from the large general wording of the covenant itself which uses the word "profession" as well as the words "trade" and "business."

The word "noisy" was intended to reach that kind of trade or business, which would be attended with the element of disturbance, unusual in, and incongruous with, what was intended to be a quiet residential locality, and the word "offensive" was introduced to reach what would be annoying and hurtful, not alone to the physical eye but to the mind's eye, which would be annoying and hurtful not merely to the eye and the nose, but to the feelings and the mind of the occupiers of the houses in Fitzwilliam-square.

In speaking of occupiers or inhabitants, I do not refer to persons who would be influenced by mere fanciful distaste, or unreasonable antipathy, or the imaginings of a nervously susceptible idiosyncrasy. I refer to the feelings and minds of ordinary sensible men. This is the meaning I attach to the word "offensive." Is then what has been done by the defendants, or is confessedly about to be done by them, offensive in the sense I have indicated? What was done in the private hospital conducted at Harcourt-street by Mrs. Perry, is about to be done here. This is manifest. What was that? Every description of patient was received into the hospital, except those suffering from contagious and infectious diseases, or actual insanity. Ladies came to be confined there, patients suffering from hysteria were admitted there, and surgical operations of all kinds were performed there. This is all admitted. Let me say, it is to be regretted that we have not from the defendant ladies a more explicit detail of the cases that were actually treated in the hospital, but I must deal with the information we have and see what would be likely to ensue from the class of patients I have referred to. The very fact in my judgment of such a class of patients being in the hospital would most materially interfere with the comfort, ordinary use, and enjoyment of the adjoining houses. Assuming the proprietors of the adjoining houses to be persons of ordinary humanity, the enjoyment and use of their houses would be most assuredly restricted. Most forms of entertainment are attended with noise. Suppose there are ladies next door who have just been confined, that there are patients suffering from hysteria, and others upon whom surgical operations have been performed, who in all probability would be in a state of weakness and exhaustion, it appears to me that this condition of things would be the normal one, having regard to the objects of the institution and the evidence that has been given. What, I ask, would be the position of the next door proprietor? If he were a person of ordinary humanity he would not use his house for the purpose of giving practically any entertainment. He would not give a ball or musical party, which I assume it is the privilege of those resident in Fitzwilliam-square to give—both would be attended with considerable noise, noise not alone from the music and dancing, but noise from the crowding of carriages and conveyances and people outside the house. If he abstained from giving entertainments, which would be attended with noise, through regard for the sufferers next door, he would certainly be restricted in the use of his own house, and if he did not abstain, his feelings would not be of the most enviable description. I think the very fact of having a number of persons next door in an ailing condition, which may result in a severe struggle for existence, sometimes ending in death, is eminently calculated to develop in any ordinary average citizen a very considerable sense of discomfort and annoyance. This may be said to be mere sentiment, but in answer to those who would indulge in that criticism, I would refer to what Lord Justice Cotton said in *Tod-*

Heatly v. *Benham* (1). He said:—"Suppose the annoyance to be a matter of sentiment, still if the sentiment is one which 99 out of every 100 would share, is not the act an annoyance?" I was glad to find that expression of opinion by that distinguished Judge, as it expresses exactly what I feel, and seems to be in accordance with common sense. Here the very fact of such an establishment being next door is itself an annoyance. In this context I may refer to what that great master of law and equity, Lord Westbury, said in the case of *St. Helen's Smelting Company* v. *Tipping* (2), referring to the question of a thing being a nuisance by reason of its being productive of sensible personal discomfort he said: "With regard to the latter, namely, to the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or *the nerves*, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurred." No doubt Lord Westbury when using this language was dealing with a case involving a nuisance at common law, but in my judgment these words are cogently relevant to the question of the true interpretation of this restrictive covenant, intended as I think it is to preserve the residential character of the locality. Lord Westbury uses the expression "to discompose or injuriously affect the senses or *nerves*," and Webster defines the word "offensive" to mean, among other significations, "giving unpleasant sensations." I think that it is eminently calculated to affect the nerves and give unpleasant sensations to be next door to an establishment in which the epileptic or hysterical patient, whose hysteria may develop into insanity are treated, and in which, as being the home of the ailing, deaths may occur with an abnormal frequency. But the matter does not at all rest here. I own I think the apprehensions of those who fear infection from the existence of such an establishment are not far-fetched or unreasonable. No doubt it is said contagious or infectious cases are not admitted, but it is a very difficult question to determine what cases are not contagious or infectious. It is common knowledge that it is difficult to say what maladies are

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(1) 40 Ch. D. 80, 89.

(2) 11 Jur. (N. S.) 785

Appeal.
1895.
PEMBROKE
v.
WARREN.

Sir P. O'Brien,
L.C.J.

not infectious; and this is so, not only by reason of the great care requisite for correct diagnosis, but by reason also of the limits of scientific and professional attainment and the inherent difficulties of the subject-matter.

In the present case different doctors of extensive and varied practice would attend different patients, and professional nurses who, I believe, would have considerable difficulty in guarding against being the vehicles of infection, would also be in attendance. The case would be quite different from that of a private house, because this establishment would in its practical entirety be a home for the sick, and for those who administer to the sick—it would be a case not of one sick person for a limited time, but of several such persons, with their respective medical attendants and nurses, throughout the entire year. No doubt there is a conflict of evidence amongst the doctors who have made affidavits in the case. Some very eminent doctors have stated their opinion that there would be no practical risk of infection; others state their opinion very strongly that such risk would exist. I turn to the affidavit of Mr. Wheeler. He states as follows:—"I have had considerable professional acquaintance and connexion with the class of institutions known as private hospitals, or homes for patients; and although I am aware that the most of such institutions profess not to take in infectious cases for treatment, and do not allege that they would deliberately do so, I am convinced that it is practically impossible altogether to exclude such infectious cases, even with the greatest care and supervision on the part of the managers of such hospitals or homes, and that this would be especially so in the case of a home managed by a lady, who had herself not any direct connexion with the medical or surgical treatment, or nursing, of the patients. Cases, which appear perfectly harmless when admitted, may develop into smallpox, scarlet fever, or other infectious disorders of the most virulent type. Tuberculous disease, in particular, not unfrequently results from other maladies, which in their inception are apparently quite harmless." Such is the opinion of Mr. Wheeler; and if a medical gentleman of great eminence entertains that opinion, is it, I ask, unreasonable on the part of Mr. Goulding and Mr. Findlater, and the other residents in the square, who entertain a similar opinion, to do so? Lord Halsbury, when giving judgment in the case of *Cowper Essex* v. *The Local Board for Acton* (1), said:—"It is doubtless attributed to Lord Hardwicke that he once said, 'the fears of mankind, though they be reasonable ones, will not create a nuisance.' But if Lord Hardwicke ever really did say so, it is quite clear that is not now the law if the fears are assumed to be reasonable." This is the language of Lord Halsbury. I think I may here refer also with advantage to what Lord Justice Bowen said in *Tod-Heatly's Case* (2). He said:—"Doctors may be able to say, and for anything I know, to say with certainty, that there is no sort of danger from this hospital to the surrounding neighbourhood. But the fact that some doctors think there is, makes it evident, at all events, that it is not a very unreasonable thing for persons of ordinary apprehension to be troubled in their minds about it. And if it is not an unreasonable thing for an ordinary person who lives in the neighbourhood to be troubled in his mind by the apprehension of such risk, it seems to me there is danger of annoyance, though there may not be a *nuisance.* As the Lord Justice Cotton has said, the very opinion of the doctors called on behalf of the plaintiffs to the effect that there may be a risk, even if they are wrong in thinking there is risk, show that it is not at all events unreasonable for less skilled and competent persons to think so. The measure is, what is a reasonable enjoyment of a man's premises—not according to the estimate given by skilled doctors as to the effect of an hospital, but according to what ordinary people who are not skilled doctors may think it." I entirely agree with what Lord Justice Bowen says in this passage of his judgment. In my opinion the fears of infection arising from the contemplated use of the house, and from the use of the square enclosure by convalescent patients, are reasonable, and have a more substantial basis than the fear of infection referred to by Sir George Jessel in the case of *Bramwell* v. *Lacy* (3).

Now, if the reasonable fears of mankind may make a nuisance, the reasonable fears of infection certainly may make this establishment in Fitzwilliam-square peculiarly offensive. In my opinion

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(1) 14 App. Cas. 153, 160. (2) 40 Ch. D. 98. (3) 10 Ch. D. 691.

Appeal.
1895.
PEMBROKE
v.
WARREN.
Sir P. O'Brien, L.C.J.

this establishment regarded as a going concern as it is about to be, if the defendants are not restrained, is obnoxious to the restrictive covenant in the lease.

It remains for me to express my opinion upon the authorities cited by the counsel for the defendants. There were two cases strongly relied on by Serjeant Campion. The first of these is *Tod-Heatly* v. *Benham* (1), and there is in that case an expression of opinion by Cotton, L.J., which was much relied on on behalf of the defendants. The covenant in that case was as follows:—A covenant by the lessee "that he, his executors, administrators, or assigns, or either of them, would not during the term thereby granted use, exercise, or carry on, or permit or suffer any other person or persons whomsoever to inhabit, dwell in, use, or occupy the said messuage or premises, or any part thereof 'who shall use or exercise therein the trades or business of a tallow-chandler, or melter of tallow, soap-boiler, slaughterman, distiller, brewer, lamp-black maker, sal-ammoniac manufacturer, or any other noisome, obnoxious, or offensive trade or business,' without the express licence and consent of the lessor, her heirs, and assigns." There was a second branch of the covenant in the following words:—"Nor do or wittingly or willingly cause or suffer to be done any act, matter, or thing in or upon or about the said premises, which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, her heirs, and assigns, or the inhabitants of the neighbouring or adjoining houses." Cotton, L.J., undoubtedly expressed the opinion that a hospital which was established for treatment of diseases of the throat, nose, ear, skin, eye, and other diseases, did not come within the earlier branch of the covenant. Serjeant Campion pressed that as a decision by the Lord Justice. In my opinion it was not a decision, it was the expression of the opinion of Lord Justice Cotton. I asked The MacDermot whether he regarded what Lord Justice Cotton said in this passage of his judgment as a decision. He immediately said not, agreeing with me that it was the opinion of an eminent Judge and no more. The case *decided* that the particular hospital was within the latter branch of the covenant. Lord Justice Cotton expressed an opinion it was not within the earlier branch of the covenant. What occurred was apparently this—the learned Lords Justices readily seeing that the case was comprehended within the second branch of the covenant, passed away from a critical consideration of the first branch. But the words in that case are different; they appear to me to point to a more objectionable class of trades or businesses than are included in the covenant here. There is the word "noisome" in the covenant in that case, which is not in the case before us, and that word may be regarded as colouring to a certain extent each of the other general words, making them more restricted in their application; indeed the very fact of the existence of the second branch may have had the effect of giving a more restricted application to the earlier branch. The case no doubt raises considerable difficulty, but I think it is distinguishable.

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(1) 40 Ch. D. 80.

The next case is *The Withington Local Board of Health* v. *Corporation of Manchester* (1). That case was strongly pressed by counsel for the defendants, and it turned on the construction of the 112th section of the Public Health Act of 1875. By that section it was provided that — "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of blood-boiler, or bone-boiler, or fellmonger, or soap-boiler, or tallow-melter, or tripe-boiler, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not exceeding £50."

These are the words of the section, and it will be perceived that the proscribed trades were so dangerously noxious that it was thought right to subject offenders to prosecution and penalty. The question however was—Whether a smallpox hospital was within that section of the Public Health Act, 1875, 38 & 39 Vict. c. 55? It was held that it was not, and in my judgment on the plainest grounds, because there is a subsequent section in that statute, the 131st section, which deals with hospitals as a distinct subject-matter, and which is in a part of the Act headed "Hospitals," showing clearly that these subjects in sect. 131 were different from those mentioned in sect. 112. Lindley, L. J., deals

(1) [1893] 2 Ch. D. 19.

with it in this way:—"Now, before I make any observations upon that particular section, and upon the decisions which have already been given explaining the meaning of it, I must point out that the word 'hospital' does not occur in the section at all. 'Infectious diseases and hospitals' are specially mentioned, and specially provided for, in another group of sections beginning with section 120, the very next group but one. It would, therefore, be rather strange if we were to find language in section 112—general language—relating to hospitals, when they are specifically mentioned and dealt with in another part of the Act." This case is plainly distinguishable from the one before us.

There was another case referred to: *Hickman* v. *Isaacs* (1). The head-note says: "Using premises for depositing large quantities of lucifer matches, whereby the premises were rendered so dangerous as to be uninsurable against fire, is not a breach of a covenant not to carry on any noisome or offensive trade, the word 'dangerous' not being in the covenant." But when the facts of that case are referred to, it will be found that the premises were not in a residential locality. There were no neighbours, who occupied adjoining houses as private residences. It is plain that the argument arising on a consideration of the object of the parties to create and maintain a residential locality would have no application in that case. Besides there was there the presence of the word "noisome," which may have had in that case the effect of giving colour to its contextual associate. These are the cases mainly relied on by the defendants, and in my opinion they are all distinguishable in many important respects from the case with which we have to deal, and judging of this covenant by the object of the parties to the lease, viz., to create and maintain a residential locality, I think this hospital, regarded as a going concern, is obnoxious to its prohibitive provisions, and that therefore the decision of the Vice-Chancellor should be affirmed, and the appeal dismissed with costs.

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(1) 4 L. T. (N. S.) 285.

FITZGIBBON, L.J. :—

There are difficulties in the way of the plaintiff which I have not been able to overcome at this stage of the case. But the defendants must not magnify, or misunderstand, the extent to which I am in their favour. My difficulty is now to apply, upon this covenant and the facts proved, the drastic and final remedy, as it is against the defendants, of an injunction on an interlocutory motion. There are several cases in which distinguished Judges have taken up the position which I now occupy. In *Tipping* v. *Eckersley* (1), Lord Hatherley laid it down that the construction of the instrument must be clear, and the breach clear. In *Wilkinson* v. *Rogers* (2), an interlocutory injunction was dissolved on appeal, and Knight Bruce, L.J., made the following observation which appears to me to apply here:—"It is enough, on the present occasion, to say that, on the materials before us, the case of the plaintiff cannot be presented more favourably than as a case open to great and serious doubt, and irreparable damage to the plaintiff being out of the question, I think that the case for an interlocutory injunction fails." In the same case, p. 69, Turner, L.J., said:—"If the covenant is clear and the breach of it is clear, and serious injury is likely to arise from the breach, it is the duty of the Court to interfere before the hearing to restrain the breach. But if the covenant is obscure or the breach doubtful, and no irreparable damage can arise to the plaintiff, then, according to the course of the Court as I understand it, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld." In the latest case, *Rapley* v. *Smart* (3), the same principle was applied. In that case the trade complained of was that of keeping a slaughter-house, to which the expression "offensive *per se*" might seem applicable in as unqualified a sense as to any trade whatever. Yet, Chitty, J., said that "the trade of a slaughter-house was not specifically mentioned in the prohibition in the covenant, and it was, both on the authorities and otherwise, clear that the trade in question was not *per se* an offensive trade," and he ordered that the motion for an injunction should stand until the trial. That is the utmost point to which, as at present advised, I could go in favour of the defendants, whose case, in any view, may be a difficult and up-hill one, for anyone unhampered by authorities would say that the establishment of a private hospital in Fitzwilliam Square was contrary to the common understanding of those who know that place. That it is offensive, in a sense, to the feelings of everyone concerned, except one single doctor, is proved by the affidavits, by the memorial signed by practically all the inhabitants, and by the resolution of the Commissioners who represent them. In addition, we have clear and uncontradicted testimony that the establishment of such an institution is not only contrary to the residential character which the square has uninterruptedly possessed ever since it was built, but that it would have the immediate effect of seriously depreciating the value of every house in the place. Besides all this, for some undisclosed reason, the interest in the lease was purchased in the first instance, not by Mrs. Perry, but by Mrs. Shekleton; and Mrs. Perry's intention to remove into it was not disclosed to the vendor, Mr. Warren. As soon as it became known, and before the transfer took place, the landlord Lord Pembroke, Mr. Warren the middleman, and the inhabitants, all protested, and the defendants were fixed with notice that the course which they were taking was hurtful to the feelings, and injurious to the pockets, of the neighbours. Under such circumstances, though I cannot see my way to concurring in the injunction, I cannot sympathise with the defendants.

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(1) 2 K. & J. 270. (2) 2 De G. J. & Sm. 68. (3) 10 *Times*' Rep. 174.

I have used the word "hospital" with regard to Mrs. Perry's establishment. But in doing so I have not overlooked the fact that Mrs. Shekleton wrote, and she and Mrs. Perry swore, and the defendants' counsel contended, that it is not a "hospital." They are all people of honour and truth, and the explanation of their denial is to be found in the fact that they use the word in a particular sense. They really mean that, to constitute a "hospital," medical or surgical treatment must be supplied, and as Mrs. Perry supplies none, her house is not a "hospital." I accept the facts as stated by the defendants, and when I use the word, I employ it to describe the establishment as it is. Mrs.

Appeal.
1895.

Pembroke
v.
Warren.

Fitz Gibbon, L.J.

Perry lets lodgings to people who need medical and surgical treatment, and she allows those who take the lodgings to get that treatment in her house for themselves. In *Bramwell* v. *Lacy* (1) the work of a charitable hospital for treating throat and chest diseases, though not carried on for profit, was said by Sir George Jessel to be, "in reality an apothecary's business," and he granted an injunction, as against an infringement of a covenant not to carry on any trade or business. In *Portman* v. *Home Hospital Association* (2), the same Judge made some observations which are directly applicable to the use of the word "hospital" here. "Suppose that a man residing in a private dwelling-house calls in a physician, because he or any member of his family is ill. The physician could exercise his calling or occupation in the house, he could use the art of healing, and perhaps receive his fee before leaving the house, but I would not hold that to be a breach of the covenant, because it is not using or permitting the house to be used. It would be a mere accident, not that to which the use of the house is devoted. Now suppose, instead of this, you take a collection of any patients who may come, which, as I understand, is intended here, of thirty or forty in number, and then call in a physician who receives his fee, you are using the house for that very purpose. Your object is to get them into that house, and to use the house for allowing the physician to exercise his calling there, and it appears to me that that shows the distinction between the using or permitting the house to be used, and the accident of the patient being in the house. The very object of the defendants in this particular case is, that the patient shall come to that house or home, for the purpose of being there visited by the physician, who shall there exercise his calling." Whether Mrs. Perry's house (and for the moment I treat her as having removed her business to it) is a hospital or not, does not depend on who pays the doctor, but depends on whether the inmates are brought there for the purpose of being treated for their ailments. In *Rolls* v. *Miller* (3), using a dwelling-house as a charitable home for girls was held to be "carrying on the business of a lodging-house." I think it is quibbling about words to discuss whether Mrs. Perry's house is or is not a "hospital"; it is a lodging-house for persons in bad health, a boarding-house for patients, and a place into which those who need medical or surgical assistance come to get it. Mrs. Perry keeps the house for profit, and she carries on a "business," which for brevity sake I call the business of a hospital. The real question is whether that business is "offensive" within the meaning of the covenant.

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(1) 10 Ch. D. 691. (2) 27 Ch. D. 81. (3) 27 Ch. D. 71.

In the first place, I think it is decided that a breach of such a covenant is not proved by the mere fact that so using the premises depreciates the value of the neighbouring houses. In that point of view *Hickman* v. *Isaacs* (1) is important; in that case the covenant was not to carry on "any noisome or offensive trade," and the defendant used the house as a store for large quantities of lucifer matches, thereby rendering it uninsurable against fire. The landlord's property was directly and largely depreciated in actual money's worth. Yet, though he was a party to the covenant, it was held that he had no remedy, because the word "dangerous" was not in the covenant, and the words "noisome or offensive" were not to be strained to cover depreciation. I may refer to another case, *Harrison* v. *Good* (2), but I guard myself against approving of it. There the plaintiff purchased a building lot, and had spent £6000 in erecting a private dwelling-house on it in Abbey Place, Marylebone, and the owner of the opposite lot, who held from the same vendor under a covenant not to do or suffer to be done anything which would be a nuisance to the vendor or any of his tenants, or the occupiers of the adjoining property, made a free gift of his plot to the Committee of National and Parochial Schools, for the purpose of having Schools erected thereon, which had actually been discontinued as a nuisance and annoyance in another place; yet it was held that the plaintiff was not entitled to relief, though it was proved that his property would be greatly depreciated, and strong evidence of annoyance was given. Bacon, V.-C., held that he could not extend the meaning of the word "nuisance" in the covenant beyond its strict legal meaning, notwithstanding the circumstances of the locality and of the case, which closely resembled those with which we have to deal here. But the Vice-Chancellor extends the words of this covenant to depreciation, for he says :—" It was a matter of great importance both to the lessor and all his lessees that the character of these houses should be maintained, and that the provisions of the leases should be so framed as to protect the lessees from acts likely to deteriorate the value of the property, which they were bound to create by their large expenditure." Later on he says, " What was the object of the parties here? It clearly was to protect as far as possible the houses in the Square from being converted to any purposes which might be offensive to or might annoy the neighbourhood, and by that means depreciate its value at any future period when other tenants might be required." I cannot agree in this; the question is how far the terms of the covenant reach? and, whatever may have been the object, we must find that the acts done by the defendants are necessarily a breach of the actual contract.

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(1) 4 L. T. (N. S.) 285.

(2) L. R. 11 Eq. 338.

The Vice-Chancellor says:—" I am of opinion that the *ejusdem generis* rule does not apply to the present case." With all respect to the learned Vice-Chancellor, in my opinion, the cases show that it does. Though the rule is to be reasonably applied, it cannot be thus summarily dismissed. Upon that point, I think I may say that our own decision in *Mullally* v. *Walsh*(1) anticipates that of the English Court of Appeal in *Anderson* v. *Anderson* (2). " The doctrine of *ejusdem generis* is a very valuable servant but it would be a most dangerous master." It cannot be thrown aside altogether. If an intention is shown to restrict the meaning of general words, then effect should be given to the doctrine, but in the absence of any such manifestation of intention, the words must receive their widest natural meaning. In this covenant, finding " offensive " coupled with " noisy," and finding it applied to specified callings, and used in a restrictive and penal clause, I cannot disregard the doctrine of *ejusdem generis*, though I feel bound to apply it with caution in determining what " offensive " means.

Passing from general remarks, I come to the two questions on the special facts—Is the covenant clear?—Is the breach clear? As to the latter, the case is in a peculiar position. Mrs Perry carried on her business for five years in Harcourt Street. This suit was commenced before she had received any patients, or done anything, "offensive" or otherwise, in Fitzwilliam Square. The plaintiff is therefore driven to show that the mere removal to Fitzwilliam Square of what had previously existed in Harcourt Street was a breach of the covenant. No evidence whatever is given that the business in Harcourt Street was "offensive *per se*," or caused any actual annoyance there. Thus I think it is, for the first time, sought to give a meaning to words which changes with the geographical situation of the premises to which they are applied. Mrs. Perry has adduced the evidence of several medical men as to the manner in which she conducted her business in Harcourt Street. Dr. William J. Smyly "frequently" sent patients of his there; Sir Philip Smyly, ever since Mrs. Perry opened her house in Harcourt Street, has been "in the habit" of sending his patients there. Dr. Little sent "many patients from time to time"; Sir William Stokes "had frequent opportunities of being in attendance"; Dr. Purefoy "frequently had patients sent there"; Dr. Hayes "had several patients cured while under treatment." One and all of these medical men negative infection, and prove that they would not have sent their patients to Mrs. Perry's house if any danger of it had existed. Dr. Franks sums up the facts, "I have for several years attended patients in Mrs. Perry's house in Harcourt Street: I have never known of an infectious case having been admitted to that house, nor have I ever known a case in her house which could have been injurious, or in any way an annoyance, to the neighbourhood. All the cases I have known in her house have been either operation cases, confinement cases, or cases of chronic disease. Mrs. Perry has never admitted to my knowledge any case of any description, unless sent by a physician or surgeon. I cannot therefore conceive how a case about to develop into one of fever could be mistaken for one of the class which finds admittance to her house." It accordingly occurs to me that the plaintiff must, in the broadest way, face and sustain the issue that the reception of patients of any kind into this house in Fitzwilliam Square is necessarily a breach of the covenant, and I think that Serjeant Campion was right when he said that the plaintiff must show that such reception is *per se*

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(1) 3 L. R. Ir. 244.

(3) [1895] 1 Q. B. 749,

Fitz Gibbon,
L.J.

offensive. That term "offensive *per se*" has been ambiguously used. For our purpose I think the true meaning is that the act, no matter how carefully done, is *in itself* "offensive," in the sense in which the covenant uses that term; but I fully admit that, in determining whether the act is offensive, locality, the object of the instrument, and everything else, as well as the mere words used, should be considered. A thing may be "offensive" within the meaning of a restrictive covenant, although not a nuisance at common law, and what would be a nuisance, as offensive *per se*, in one place, might not be so in another. But where a party has recourse to legal proceedings to enforce a contract of this kind, he must show that the act of which he complains is clearly a breach of that contract, and the only evidence available here of the character of the act is to be got by transferring the evidence as to Harcourt Street to Fitzwilliam Square. There is no evidence that any human being suffered annoyance, or made any complaint, or suggested that the Harcourt Street business was offensive, during the five years of its continuance there. Both houses alike adjoin other dwelling-houses, and we are called on to grant an injunction upon evidence which is all one way, and all in favour of the defendant, so far as Harcourt Street is concerned. No offensiveness whatever, in any sense of the word, is proved there. At the same time I am not without my suspicions, and I go fully with the Lord Chief Justice in thinkiug that Mrs. Perry might have been more communicative. My whole difficulty would disappear if I found that there had been any actual "offence," or even evidence of actual risk, to the neighbours in Harcourt Street. I should like to see the accounts of Mrs. Perry's business, the entries, which I suppose she has, of the number of cases treated, the complaints from which the patients were suffering, whether any of them died, and so on. But the absence or incompleteness of evidence is no reason for granting an interlocutory injunction. It is the reverse.

About Fitzwilliam Square, the only evidence is Mrs. Perry's own. She tells us that the house contains eight rooms capable of being used as bed-rooms. This certainly indicates an intention of converting some at least of the rooms usually used as sitting rooms into bed-rooms. She and her household are to occupy two of these rooms, and there is a third which is, at present, used by a gentleman who is in good health, but who, for some unexplained reason, lodges in a house otherwise devoted to invalids. I cannot say that, necessarily and of itself, the presence in a house of five or six people who are in bad health is "offensive" to the neighbours, within the meaning of such a covenant as this. It is easy to imagine how such a household might prove offensive, and if there was any evidence of actual annoyance of any kind, I should not hesitate to apply the covenant. For example, if Mrs. Perry received even harmless idiots or imbeciles for profit, and sent them daily in a melancholy procession to exercise in the Square, this might be offensive to those who were entitled to enjoy themselves there. Similarly, she might send convalescents, or patients who had undergone operations, into the Square, in such numbers, or under such circumstances, as to be offensive. A single epileptic or hysterical patient, in one single night, might make a case for the plaintiff, by showing Mrs. Perry's business to be both noisy and offensive. But we have no evidence as yet of such things. There is an extraordinary instance in the affidavits showing how unsatisfactory the evidence is at present. A lady's maid in the employment of Mr. Monahan, who resides next door, has sworn that on the evening of the 5th or 6th of March, she cannot say positively which, but on one or other of the two, between the hours of 8 and 9 p.m., while engaged sewing in her own room, she was disturbed by a noise of loud screaming coming from the adjoining house, No. 28, which continued for nearly three quarters of an hour, and she further swears that she was kept awake for a great part of the same night, by the loud continuous coughing of some inmate of the same house. That is distinct evidence of offensiveness, if it is true. But it is met by the evidence of Mrs. Perry, her daughter, and her nurse, that it is positively untrue; they one and all swear that there was "no screaming whatever, loud or otherwise," on either of the evenings named, or on any other evening since they moved into the house, and that from March 2nd to the date of the affidavit, the upper part of the house was unoccupied save by the nurse herself. Counsel for the plaintiff dropped the incident, and left the defendant's counsel to open it. I certainly think that this extraordinary

Appeal.
1895.

PEMBROKE
v.
WARREN.

Fitz Gibbon,
L.J.

contradiction might well have been left to be cleared up before granting an interlocutory injunction. There might be a mistake about the date, but then the affidavit was made within a week of the occurrence, and the denial covers every possible date. The nerves of the lady's maid might have been so excited about this hospital next door, that she imagined that some noise came from it, which really came from some other house, or from the street. If so, we should see how far fanciful annoyances were the foundation of the plaintiff's case. If such an occurrence really took place, it might in itself be a breach of this covenant. But we cannot rely upon it now, when the defendant's counsel challenged the plaintiff's counsel to go into it, and they declined. However, there it is, and it increases the difficulty of summarily disposing of the case, and of holding that the breach is clear. As to danger of infection—Mrs. Perry is desirous of establishing for profit an establishment for patients suffering from non-infectious and non-contagious diseases only. Her success in her business depends on keeping out even the smallest apprehension of infection. My own view as a juror would be that there is no greater risk of contagion or infection from the five patients in Mrs. Perry's house, than from any five inhabitants of any other house. Perhaps there is even less; for this reason—the patients are sent in by a limited number of doctors, who want to use the house for the reception of non-infectious and non-contagious cases, and who prove that their desire, as well as Mrs. Perry's interest, is against running any risk of infection. No evidence of infection in Harcourt Street is given, and how far the search for such evidence has been carried may be conjectured from the fact that an affidavit was got from Mr. Alfred M'Dermott, to show that in a private hospital in Lower Leeson Street, where a son of his was a patient, some other patient developed smallpox at a time when we all know that the disease was epidemic. But even in such a case, the precautions that would be at hand to check its spreading would be greater, and detection would be speedier, than in an ordinary house. I therefore leave the risk of infection out of consideration, there being in my opinion no evidence of it.

Next comes the question—What is the contract? I cannot agree with the Vice-Chancellor in his construction of the clause

Appeal.
1895.
PEMBROKE
v.
WARREN.
Fitz Gibbon, L.J.

about the shop; and the way he read this clause makes me hesitate to follow him in his further remarks on the terms of the lease. He thinks that no shop was, under any circumstances, to be opened in any part of these premises, and that the reason why the front alone was mentioned in the covenant was because no one thought of having a shop in the back of the premises. I, on the contrary, think that the usual rule of construction in such cases shows that the rear of the house might be so used, and that the front alone was to keep up the residential character, the parties being left free to open a shop in the back lane, as has been done in many similar localities in Dublin. In prohibiting the use of the front as a shop, there is, in my opinion, an implied permission so to use the rear. The covenant, therefore, opens with a clause which is both restrictive and restricted, and I think the clause as to the trades is open to the same remark. I think it allows those trades to be carried on which are not forbidden; and it does not forbid all trades. But I am prepared to give the widest scope to the prohibition, consistently with not going beyond the *genus* to which the enumerated trades belong—namely, noisy and offensive trades—and I include every form of "business" under the term "trade."

In applying the doctrine of *ejusdem generis*, we should first try to find out the essential difference which distinguishes the enumerated *species*, in order to find out what is the *genus*. It is justifiable to be logical in using logical terms. I cannot give the words in this covenant a universal meaning which would prohibit everything that could offend any or every feeling of sense of the mind, or mere imagination or sentiment, in the neighbourhood. It would have been easy to insert a covenant that no business whatever should be carried on. The Vice-Chancellor has gone so far as to say that the house could not be let in tenements. I cannot see how its conversion into suites of apartments would have been necessarily "noisy or offensive." Using it as a lodging-house might be objectionable to the neighbours, and yet not a breach of the covenant. All the enumerated trades seem to me to savour of some disagreeable emanation, as distinguished from mere offensiveness to the feelings, or to the dignity, of the residents in a fashionable Square. The "hatter" is not the

Appeal.
1895.

Pembroke
v.
Warren.

Fitz Gibbon,
L.J.

fin-de-siècle retailer of silk hats, but the felt-boiling manufacturer of 1820. The "druggist" and "apothecary" may be reasonably suspected of causing offensive smells, and the introduction of the word "noisy" strengthens the conclusion that the word "offensive" was used in a restricted sense. It is, at the very least, not clear that the covenant applies to the reception of five or six invalid lodgers, respectable, and presumably inoffensive, persons.

How stand the authorities? I go back to the first in date, which down to the present day is quoted as a leading authority. *Jones* v. *Thorn* (1) was decided in 1823, upon a lease of a house in Gray's Inn Lane Road, which contained a covenant not to carry on certain trades or businesses, including those of a brewer, dyer, soap-boiler, farrier, smith, or iron-founder, or to use the house as a lock-up house, sheriff's office, lottery-office, auction or sale room, or broker's shop, "or any other trade or business, that may be, or grow or lead to be offensive, or any annoyance or disturbance, to any of the tenants of the lessor, or his or their landlady." The defendant set up the business of a licensed victualler—a public-house—and it was held that this was not a breach of the covenant, though several of the enumerated trades, *e.g.* the sheriff's office, were "offensive" otherwise than to the senses of smell or hearing. The case was sent from the Master of the Rolls to the Court of Common Pleas, for the opinion of the Common Law Judges as to whether the covenant had been broken. The argument was almost the same as here, and the reasons appear in the fuller report in 3 D. & Ry. Counsel for the plaintiff said, "It cannot be doubted that the act of opening a public-house may *grow or lead to be offensive*, even if it be not so in the first instance." Bayley, J., asked, "Can we say that the covenant is broken, until the business has become actually and positively offensive?" Counsel answers, "Certainly. The words of the lease are contingent and prospective; they prohibit any trade that is likely to become offensive; and the trade of a publican unquestionably is." Then Best, J., asks, "Can we take judicial notice of the fact that a public-house is *per se* likely to become a nuisance?" and the answer is, "The Court will look to the intention of the parties when the lease was framed." In his reply counsel said, "The only question is, What is the general tendency of a public-house? and universal experience answers that it is likely to be 'offensive.'" In giving judgment, Bayley, J., says, "Your argument must go this length, that every public-house is *per se*, and under any circumstances, a nuisance. Can we hold that to be law? I doubt not;" and the Common Pleas held that the covenant was not broken.

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(1) 3 D. & Ry. 152.

Doe v. *Bird* (1) was very like the present case in some respects, and the course of that case makes it a strong authority. It was first tried at Nisi Prius, as reported in 6 C. & P. 195. The covenant there was not to permit or suffer the *trades or businesses* of a butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, soap-maker, sugar-baker, fellmonger, dyer, distiller, victualler, vintner, tavern-keeper, or coffee-house keeper, tanner, common brewer, "or *any offensive trade*." The lessee was a doctor, and he set up a private lunatic asylum. Denman, C.J., in summing up, said:—"The question is, whether, as the business carried on here is not among those enumerated, it comes within the term 'offensive trade;' and upon this point, I think, notwithstanding the word business is omitted after the words offensive trade, that this is within the meaning of the covenant; because we must look at the object of the covenant, which is not to prevent such tradings as are within the meaning of the bankrupt laws, but to prevent such things as are likely to be an annoyance." He left the question to the jury, whether the covenant had been broken, and the jury found that it had. The case came then before the Court of Queen's Bench on a new trial motion, and the defendant succeeded. It is true that the decision rested largely on the introduction of the words "trades or businesses" in the first instance, while "offensive trade" only occurred in the general words; but it is a clear decision that, in applying such a covenant, the *genus* of offensiveness, so to speak, must be restricted, and cannot be lightly extended by inference from "the object of the covenant."

In the *Wanstead Local Board of Health* v. *Hill* (2) again the *genus* of offensiveness was limited by the enumerated trades, and it

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(1) 6 C. & P. 195; 2 A. & E. 161.

(2) 13 C. B. (N. S.) 479.

Appeal. 1895. PEMBROKE *v.* WARREN. Fitz Gibbon, L.J.

was held that "other noxious or offensive trade or business" did not include brick-making. This and the *Withington Case* (1) were decided on the construction of statutes, but the canons of construction of covenants and statutes must, in my opinion, be the same for our purpose.

In *Tod-Heatly* v. *Benham* (2) the enumerated trades included tallow-chandler, soap-boiler, slaughterman, distiller, brewer, lamp-black maker, and sal-ammoniac manufacturer, and the general words included "any other noisome, obnoxious, or offensive trade or business." I cannot agree that "noisome" is a universal term; it implies a special form of annoyance, viz. unwholesomeness, just as "noisy" implies offence to the ear. But "obnoxious" is a wider term, and both it and "offensive" may fairly cover anything that causes annoyance. Yet the Court undoubtedly expressed an opinion that the case could not be brought under that clause, and though the decision was rested on the later covenant, the Judges certainly so treated the case as to convey, and Cotton, L.J., expressly said, that this clause did not apply to a hospital.

In the *Withington Local Board of Health* v. *Corporation of Manchester* (1), a smallpox hospital was distinctly held not to be within section 112 of the Public Health Act, 1875, and not to be within the general words "any other noxious or offensive trade, business, or manufacture." Though this decision was no doubt affected by the fact that the Act of Parliament contained another section—section 131—dealing with hospitals, I can see no reason, in the circumstances, for saying that the establishment of a smallpox hospital as a business, was not within the policy of the enactment which required the consent of the local authority, and it is therefore, to my mind, a strong authority against extension by implication of such a restriction as that with which we have to deal.

I admit that all circumstances, and especially locality, are to be taken into consideration, but I do not think that the plaintiff can sustain the interlocutory injunction upon such circumstances alone. I admit that this lease shows a clear intention that Fitzwilliam Square was to be and remain a place for dwelling-houses, but I

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(1) [1893] 2 Ch. D. 19.

(2) 40 Ch. D. 80.

Appeal.
1895.
PEMBROKE
v.
WARREN.
Fitz Gibbon,
L.J.

cannot hold that the state of health of the lodgers prevents the house in which they live from being a dwelling-house. *Gutteridge* v. *Munyard* (1) is an old authority, *Proudfoot* v. *Hart* (2) is a new one, and both show that regard must be had to the locality and neighbourhood. Spitalfields is contrasted by Lord Esher with Grosvenor Square, just as another Judge contrasted Bermondsey with Belgrave Square, but Tindal, C.J., truly says that we are only to make all fair allowances without straining the covenant. I draw the line short of holding that the mere fact of taking in five or six patients as lodgers into this house, though it is in Fitzwilliam Square, is necessarily and *per se* offensive, within the meaning of a covenant about shops and noisy and offensive trades. I cannot go further than the Court of Appeal did in *Wilkinson* v. *Rogers* (3), or than Chitty, J., did in *Rapley* v. *Smart* (4). That this establishment, even though carried on in the regular and well-conducted way in which Mrs. Perry carried it on, is unpleasant, and even repugnant to the feelings of the neighbours, in this fashionable neighbourhood, I have no doubt. Even that it is, in a sense, "offensive," I may admit, but I cannot hold it to be necessarily and *per se* offensive within the meaning of this covenant, and I am therefore unable to agree with the conclusions arrived at by the Vice-Chancellor and the Lord Chief Justice.

WALKER, L.J. :—

The view of Fitz Gibbon, L.J., would dispose of this motion, though by no means of the action, adversely to the plaintiff, and but for the view he has expressed I might be prepared to give a simple assent to the judgment of the Lord Chief Justice, in which I concur. In result I must give the reasons for my concurrence. If the contract contained in the defendants' lease has been broken, the plaintiff is entitled to an injunction without proof of damage, because the parties have measured their rights by their contract.

The questions therefore are two :—1. What is the true construction of the covenant? 2. Whether upon the facts such a breach of it has been made out as entitles the plaintiff to an injunction?

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(1) 7 C. & P. 129.

(2) 25 Q. B. D. 42.

(3) 2 De G. J. & Sm. 62.

(4) 10 *Times'* Rep. 174.

For the purpose of ascertaining the true construction of the covenant we must look at two things, one the object of the covenant, secondly the words used in the covenant itself. The object may be plain, and yet the words used may be such that according to their fair grammatical interpretation they are incapable of carrying it out. On the other hand, the words may be capable of a meaning, which the object shows it would be irrational to attribute to them. In *Rolls* v. *Miller* (1), Lindley, L.J., speaking of a covenant analogous to the present, says:—"Now the first question to be considered is what is the object of the covenant? The covenant must be construed consistently with that object, and on the other hand something may fall within the scope of the covenant, which does not fall within its words. One must look therefore at both the words and the object." Having found out therefore the object, we must look at the words in their ordinary sense to see whether they are capable in their fair meaning, as matter of construction, of carrying out the objects of the covenant.

What then is the object of the covenant? At the date of the lease of 27th June, 1822, Fitzwilliam-square had been formed, and a private Act had been passed providing for its ornamentation, preservation, and lighting, in the language stated by the Lord Chief Justice. The ground on the south side of it was vacant; on the other sides thirty-four houses had been built, occupied apparently by private gentlemen, and this building lease of 1822 bound the lessee to erect good and substantial dwelling-houses. It is stated, and I have no doubt, that all the leases contain the same covenants. The Act provides for their being symmetrical in character and height, and for flagways as before the houses in Merrion-square—a residential quarter. It also provides for the maintenance of the square as a pleasure ground, making all the tenants partners, as it were, in its ornamentation, and binding them by the will of the majority. It then provides that the tenant shall not employ or use any part of the front of the said houses as a shop. Thus it secures, so far as externals are concerned, that the houses shall be residential and appear to be occupied by private persons, and having thus dealt with the structures themselves, it proceeds to make provision for the comfort and quiet of their occupiers in these words—"shall not follow or carry on or permit or suffer to be followed or carried on in the said houses or on any part of the said demised premises the business of a tavern, ale-house, soap-boiler, chandler, baker, butcher, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, hatter, silversmith, coppersmith, pewterer, blacksmith, or any other offensive or noisy trade, business, or profession whatsoever."

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(1) 27 Ch. D. 87.

That covenant by using the word "noisy" makes ample provision for quiet in the home, and it prohibits even a noisy "profession." One would also expect the comfort and enjoyment of the home to be secured. In the absence of all covenant, the occupation of one of those residential houses in the square would carry with it the right in law to be protected, in the words of Knight-Bruce, V.-C., in *Walter* v. *Selfe* (1), against any "inconvenience more than fanciful, more than one of mere delicacy or fastidiousness as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." It would seem to me therefore that a prohibition against anything which would diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the other residential houses, would be naturally part of the objects of the covenant I have read.

We must however find words in it which, according to the English language and without violating any rule of construction, if such exist, are capable of carrying out such an object. What is the meaning of the word "offensive"? It has no technical or legal meaning. It has several meanings in our language—"offensive" as opposed to defensive, as we speak of offensive and defensive treaties—injurious, annoying, or displeasing, disgusting or disagreeable, as "an offensive smell." It is this last meaning which it was contended the word must bear, and mainly by force of the application of the rule of *ejusdem generis*—a rule of construction adopted for ascertaining intention, but always yielding to another intention found. This rule of construction is that where you have an enumeration of particulars, and general words follow, the general words do not extend the meaning beyond the subjects of the class, or, in other words, if you have a specific enumeration of subjects constituting a *genus*, the general words are restricted to the same *genus*.

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(1) 4 De G. & Sm. 315.

But it may be that the particular subjects enumerated are of such different natures *inter se* as not to furnish a standard which will limit the general words beyond what is conveyed by their natural grammatical meaning. In the first place there are here a number of trades enumerated, which are not noisy, and are also not offensive *per se*, therefore the word offensive must at least mean something more than offensive *per se*, or noxious. It must include something, which may assume by use, or in the way it is conducted, an offensive character. The addition of the words "or noisy" to "offensive" is most important. Is there a leading idea running through both? I think there is; the prohibition of what would create that discomfort, in the use of the dwelling-house, which I infer to be an object of this covenant, as distinct from its words.

Further, I have not found this strict rule applied in any case, in which such large words were used as "trade, business, or profession, whatsoever." Therefore, neither in the meaning of "offensive," according to the English language, nor in the rule of construction I have mentioned, nor in the object of the covenant as collected from the entire deed, do I find any reason for saying that this covenant is not large enough to create a security for the maintenance of that comfort in the enjoyment of property, which the Vice-Chancellor defines in the case of *Walter* v. *Selfe* (1). I do not see my way to limit it to physical hurt.

In *Bramwell* v. *Lacy* (2), the premises were in St. John's Gardens, Kensington Park, a residential neighbourhood, and that case decides that an hospital is a "business," and, on the evidence,

(1) 4 De G. & Sm. 315.

(2) 10 Ch. D. 692.

that it came within a covenant, which prohibited "any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." The Master of the Rolls among the heads includes "possible damage from infection."

That this hospital would be a business is proved by *Portman* v. *Home Hospital Association* (1). We were then referred to three cases which, we were told, put a fixed meaning on general words such as "noxious or offensive trade, business, or manufacture," and established that a hospital at all events could not come within them.

They are *Wanstead Local Board of Health* v. *Hill* (2); *Braintree Local Board* v. *Boyton* (3), and *Withington Local Board of Health* v. *Corporation of Manchester* (4). In all, the right of suit depended not on the possession of property, or on contract, but a special section of the Public Health Act of the time, which prohibited the establishment in an urban sanitary district of certain trades coming under the special heading of "offensive," adding "or any other noxious or offensive trade, business, or manufacture," and provided a penalty recoverable before Justices.

Two of these cases decided that the section only applied to trades noxious *per se*. Willes, J., in his judgment in the *Wanstead Case* (2), said:—"The substances, which are dealt with in the trades which are specified, are substances which, without anything being done to them, must be, or by progress of time must necessarily become, a nuisance and annoyance to the neighbourhood," and in the hospital case it was further decided that the section only applied to a business which is ordinarily called a trade, and that an hospital was not within the scope of the section at all. The argument can be reduced to an absurdity, if applied to this case. Most of the trades specified in the contract here are not noxious *per se*, and would come within the decision in 13 C. B. (N.S.), and be excluded from the Public Health Act section. Take for instance brick-making, which, according to *Walter* v. *Selfe* (5)

(1) 27 Ch. D. 31 n.

(2) 13 C. B. (N. S.) 479.

(3) 48 J. P. 582.

(4) [1893] 2 Ch. 19.

(5) 4 De G. & Sm. 315

is a private nuisance, yet it would not be within this covenant. Therefore the contract must embrace businesses far outside the range of the Public Health Act. It would follow also from the argument that a smallpox hospital, breathing infection all round it, or a lunatic asylum, would not be within this covenant. The cases rightly understood are authorities that this contract must receive a far wider construction than that which it is contended should be applied on the analogy of these three cases, and at least as wide a construction as would embrace every kind of trade specified. In my opinion, however, these three cases depend on the special construction of the Public Health Act, and have no application to such a case as this.

The case of *Tod-Heatly* v. *Benham* (1) requires more consideration. The case was decided on the second branch of the covenant, "annoyance, grievance, or damage." There might be "annoyance or grievance" without pecuniary loss, though it would seem the difficulty of letting the property would involve it. The words had no definite legal meaning, and the test applied was whether reasonable people (not one particular man) would reasonably feel annoyance or grievance, having regard to the ordinary use of a house for pleasurable enjoyment. Lindley, L. J., says:—"Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of this covenant." I may also refer to the language of Bowen, L.J., at p. 98 of the report. But the observations of Cotton, L.J., must be considered, because they were much relied on. He says:—"Now the covenant divides itself into two parts, the first part restrains the lessee from carrying on certain trades, 'or any other noxious or offensive trade or business without the licence of the lessor.' The case does not come within that." That *dictum*, for it is no more, seems to me only this—We have here a covenant confined in one part to noxious and offensive trades, and we have another branch of a much wider scope. Therefore the limited meaning may be given to noxious or offensive in the first branch, i.e. *per se* noxious or offensive trades, dealing with substances injurious and deleterious in their character, much of the same class as are the objects of the Public Health provisions. It is not an authority as to what the decision would have been on the first branch of the covenant, if it stood alone in the deed, much less on the effect of words so comprehensive, as occur in the lease from Lord Pembroke here. The case of *Doe* d. *Wetherell* v. *Bird* (1) which is reported in 2 Ad. & Ell. 161, is of importance. The covenant was that the lessee should not "use or exercise therein or thereupon the *trades or businesses* of a butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe-maker, tobacco-pipe-burner, soap-maker, sugar-baker, fellmonger, dyer, distiller, victualler, vintner, tavern-keeper, or coffee-house-keeper, tanner, common brewer, or any offensive *trade*." The defendant used the house as a private lunatic asylum. The Chief Justice at the trial told the jury that this business was a trade, and left it to the jury to say whether it was offensive. It was not contended on the new trial motion that the word "offensive" was limited to noxious *per se*, but it was argued successfully that as "businesses" occurred in the first branch, and "trade" only was used in the general words, a lunatic asylum, which is not conducted by buying and selling, could not come at all within the description of "trade." If it could, it was not argued that the jury might not have found it as a fact "offensive." So far, therefore, that case is an authority for the plaintiff on the construction of the present covenant.

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(1) 40 Ch. D. 80.

There are other cases, which depended on this, that the business sought to be prohibited was not necessarily noxious or offensive, and there was no evidence before the Court to justify it in concluding that it was, or would necessarily become, so. Such cases are *Cleaver* v. *Bacon* (2), and *Rapley* v. *Smart* (3).

The case of *Fleet* v. *Metropolitan Hospital* (4) was one in which the evidence fell short of establishing that a smallpox hospital was a source of danger, or created a well-founded and reasonable apprehension of it. It was proceeded against as a common law nuisance. The same observation applies to a case decided since the argument, *i.e. The Attorney-General* v. *Guilford, Godalming and Woking Local Hospital Board* (5), in which

(1) 6 C. & P. 195.

(2) 4 *Times*' R. 27.

(3) 10 *Times*' R. 174.

(4) 2 *Times*' R. 361.

(5) 12 *Times*' R. 54.

an injunction was refused on the ground that there was not proved a real apprehension of a real danger, but a sentimental or a fanciful one.

The case of *Hickman* v. *Isaacs* (1) proceeded, I think, on the assumption that the word "offensive" should receive its character from "noisome" which preceded it in the covenant prohibiting "any noisome or offensive trade."

The only remaining question is whether the facts established in evidence make out a case for protection by injunction. The plaintiff speaking for the residents who are his tenants or sub-tenants, and the Commissioners who have the control of the square inclosure, say—Mrs. Perry has established a business in the square, and we have made out such a reasonable apprehension of injury to health, such a reasonable apprehension of injury to property, and such a reasonable apprehension of injury to, and interference with, personal comfort and enjoyment of home and the square inclosure, the maintenance of which last is a duty the defendant shares in, as under all or some or one of these heads make that "business" an offensive one within the meaning of the contract.

It is admitted that Mrs. Perry for five years prior to 1895 carried on in Harcourt-street the business of letting for profit rooms in her house for the reception of patients sent there by doctors and surgeons, with the view of being treated surgically and medically by them. It is denied, and for the purposes of this motion I assume truly denied, that she received knowingly patients suffering from infectious diseases, or tuberculosis, or lung disease, or madness. Patients suffering from hysteria are not excluded. Ladies are received for their confinements, and there may be in it ladies suffering from puerperal fever or puerperal mania. One trained nurse is constantly employed, and other nurses are brought in if the cases require. Surgical operations of every kind are performed with or without anæsthetics. At present five rooms out of the eight, which the house contains, are open for patients. It is not disputed that the business in this house in Fitzwilliam-square will be carried on as it has been in

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(1) 4 L. T. (N. S.) 285.

Harcourt-street, and that it has been taken for such purpose. Such private Institutions are usually called Home Hospitals, and I think that term aptly describes 28 Fitzwilliam-square.

We have it therefore admitted what the use is, and is intended to be, and the evidence here would equally apply to Harcourt-street. We do not know what covenant, if any, bound Harcourt-street. This last consideration shows that the defendants' case would not be bettered by further evidence, and that they have no object in protracting this litigation to a plenary hearing. Convalescing patients will be entitled to the use of the square inclosure, in common with the residents and their wives and children.

In considering the evidence it must be borne in mind that what would be a nuisance (within the doctrine of *Walter* v. *Selfe*) (1) in Merrion-square involves very different considerations from what would be a nuisance—say at the North Wall. I do not think the test is whether the presence of five people in the house out of health would be an offence *per se* within the covenant. On the part of the inhabitants of the square there is practically unanimity in the opposition to the defendants. This must be disregarded, so far as it rests on fanciful fears or fastidiousness, or any innate dislike to the introduction of the business element into the character of the square. But seven witnesses, including two eminent house agents, swear that in their opinion the maintenance of this hospital, including the throwing open of the square to the convalescing patients, will lead to serious depreciation in the letting and selling value of the houses. In my opinion, that is a matter not open to doubt; but I do not say it would furnish ground for relief, unless it flowed from an "offensive" business, *i.e.* offensive as I interpret it.

Further, several of the witnesses say that, in their opinion, there will be a danger of infection to the residents and their children from this use of the square, and that such use will create material discomfort to the residents, who have the joint right to use it, and will lead to their exclusion from its use. They also say that in an hospital such as this, the owner of which receives patients as they are sent her, no amount of care can protect

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(1) 4 De G. & Sm. 315.

Appeal. 1895.

PEMBROKE v. WARREN.

Walker, L.J.

against the inadvertent admission of infectious cases: "occasional negligence is one of the ordinary incidents of human life" (1). It is in the early stage of disease patients would be admitted, and in that stage the diagnosis of the most skilled physician often fails him, and I cannot think that a continuous series of patients can be put on the same footing as the isolated case of five persons being ill in a private house. The witnesses also say that the introduction of surgical cases, hysterical cases, and maternity cases, with possible developments of insanity and delirium, will lead to consequences which they describe as distressing and detrimental to comfort and the enjoyment of their homes. I cannot say that these are not reasonable apprehensions, entertained by reasonable men. To judge whether a person in the enjoyment of his property suffers sensible discomfort, one must take human life with all its ordinary incidents, which includes reasonable apprehensions entertained by reasonable persons. I do not think one is compelled to wait till actual physical or material hurt is sustained.

The judgments in *Tod-Heatly* v. *Benham* (2) seem to me to adopt and proceed upon this view. As to the granting of the injunction at this stage, each case depends on its own circumstances. There are many in which it has been granted and many in which it has been refused. I of course admit with FitzGibbon, L.J., that the contract must be established in the plaintiff's favour and the breach made out. Here the mode in which the business is to be conducted is not in dispute, the acts of the defendants were done deliberately and after warning, and I do not see how from the defendants' point of view the case can be bettered by further investigation.

I think the appeal should be dismissed.

R. D. M

(1) 14 App. Cas. 161.

(2) 40 Ch. D. 80.

V.-C.
1896.
PEMBROKE
v.
WARREN.
Feb. 6.

A consent having been entered into that the order of the Vice-Chancellor, affirmed by the Court of Appeal, should be treated as if it had been made on the final hearing of the action, and that a perpetual injunction should issue in the terms of the said order, the case was now placed in the Vice-Chancellor's action list for the purpose of obtaining judgment, and of having the question of costs decided.

For the present plaintiff it was contended that he was entitled to the costs of the action from its commencement. *Jones* v. *Simes* (1) was cited.

For the defendants it was contended, amongst other things, that the present plaintiff was not entitled to the costs incurred prior to the order of the 15th May, 1895. White on Supplement and Revivor, 143, and Pemberton on Revivor and Supplement, 155, were referred to.

The Vice-Chancellor held that the present plaintiff was entitled to the entire costs of the action. These costs were awarded against Mrs. Perry and Mrs. Shekleton only; the defen- Graves Warren being ordered to abide his own costs.

Solicitor for the plaintiff: *Arthur Lee Barlee.*
Solicitors for the defendant Graves Warren: *Hone & Falkiner.*
Solicitors for the defendant Mary Shekleton: *Molloy & Molloy.*
Solicitor for the defendant Elizabeth Perry: *Arthur F. Maffett.*

D. M'C. M.

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(1) 43 Ch. D. 607.

M'MAHON *v.* GAUSSEN.

V.-C.
1895.
July 12.

Will—Power—Advancement—Appointed share—"Vested"—"Benefit"—Discretion of trustees.

A testator, by his will, bequeathed to his son and his son's wife successive protected life interests in the income of a residuary fund, and gave them a power to appoint the fund among their children, and directed that in default of appointment their children should take the fund in equal shares. There followed this gift the usual hotchpot and advancement clauses; but, by the power of appointment the donees were enabled to direct what power of advancement the trustees should have in respect of any appointed share.

The donees, in exercise of the power, appointed by deed to one of their children a portion of the residuary fund, subject to their life interests. The deed of appointment contained no advancement clause:—

Held, that the appointment was to be read into the will, and that the advancement clause in the will applied to the appointed share.

ADJOURNED SUMMONS. Application by the trustees of the will of Charles Gaussen, deceased, asking the Court to determine whether, upon the true construction of the said will and a deed of appointment executed under a power thereby conferred, the trustees would be justified in raising out of the trust premises the sum of £1100, part of £3700 appointed by the said deed (subject to the appointors' life interests) to one of the grandsons of the deceased, and in applying the same in paying off a mortgage on the reversionary interest of the said grandson in the said sum of £3700, and in procuring him an outfit and charger for a cavalry regiment.

Charles Gaussen, by his will dated June 4, 1878, bequeathed and devised all his residuary estate to trustees, upon trust to invest the same in certain specified securities, and to pay the income thereof to his son David Gaussen for life, with a gift over upon his becoming bankrupt, or attempting to alienate his life interest or any part thereof, and on the determination of his estate to his son's wife Eliza Gaussen for her separate use, without power of anticipation, for life or till her second marriage.

On the determination of the interests thus given to his son and his son's wife, the testator directed his trustees to hold the trust funds and the income thereof "in trust for all or such one or more exclusively of the others or other of the issue of the said David Gaussen and Eliza Gaussen to be born during their lives, or the life of the survivor of them, or within twenty-one years after the death of such survivor, at such age or time, or respective ages or times if more than one, in such shares and with such future or executory or other trusts, for the benefit of the said issue, or some or one of them, with such provisions for their respective maintenance and education or advancement, at the discretion of the trustees or trustee for the time being of his will, or of any other persons or person, and upon such conditions, with such restrictions and in such manner, as the said David Gaussen and Eliza Gaussen should by deed, with or without power of revocation and new appointment, jointly appoint; and in default of such appointment, as the survivor should appoint; and in default of any appointment, in trust for the said children in equal shares." There followed this bequest a hotchpot clause in the usual form, and an advancement clause, which was as follows:—"Provided also that the said trustees or trustee may, after the failure or determination of the trust hereinbefore declared in favour of the said David Gaussen and the death or future marriage of the said Eliza Gaussen (or previous thereto with the respective consents in writing of the said David Gaussen until the failure or determination of the trust hereinbefore declared in his favour, and of the said Eliza Gaussen until she shall die or marry again), raise any part or parts not exceeding one-half of the then expectant presumptive or vested share of any child of the said David Gaussen and Eliza Gaussen, under the trusts thereinbefore declared, and apply the same for his or her advancement or benefit."

The testator's will was duly proved by the executors therein named.

There were several children of the marriage of David Gaussen and Eliza Gaussen, the eldest of whom was Charles Louis Gaussen.

By deed poll, dated May 19, 1894, David Gaussen and Eliza Gaussen, in exercise of the power conferred on them by the said will, irrevocably appointed that from and after the failure or determination of the trusts declared in the said will in favour of David Gaussen, and the death or future marriage of Eliza Gaussen, and in the meantime subject and without prejudice to their respective terminable life interests, the trustees of the will should raise out of the trust premises the sum of £3700, and hold the same in trust for Charles Louis Gaussen absolutely. This deed poll contained no provisions for the maintenance, education, or advancement of Charles Louis Gaussen.

By indenture, dated June 21, 1894, Charles Louis Gaussen mortgaged his interest in the sum so appointed to secure the sum of £1000 borrowed by him from the Legal and General Life Assurance Society, subject to interest at the rate of £5 per cent. per annum.

Charles Louis Gaussen had at the age of nineteen joined the regiment of the 18th Hussars, and had subsequently been appointed an aide-de-camp to the Lieutenant-Governor of Bengal. While serving with his regiment and acting as aide-de-camp he had incurred considerable debts, and the loan was obtained by him from the Assurance Society to enable him to pay off the same. At the date of the application he was twenty-five years of age, and had been recently appointed to the Indian Staff Corps and 1st Bengal Cavalry. He was about to be married to a lady who was entitled to £300 a-year in her own right, which was to be put in settlement on the occasion of the marriage.

On June 17, 1895, David Gaussen and Eliza Gaussen applied to the trustees to raise the sum of £1100, part of the said £3700 appointed by the said deed poll, and to apply the same in paying off the said mortgage, and in providing a uniform and charger necessary for Charles Louis Gaussen on his appointment to the 1st Bengal Cavalry. The consent of the trustees to this application of the £1100 was formally given in writing, but doubts having arisen as to their power to raise and apply this sum as proposed, the summons was issued to take the opinion of the Court.

G. Y. Dixon, for the trustees:—

The clauses in the will follow the forms given in Key and Elphinstone's Precedents in Conveyancing, and in Davidson's Conveyancing. It is said that the better opinion is that where an advancement clause does not expressly apply to appointed shares no advancement can be made under it in respect of an appointed share: Davidson, vol. iii., pt. i., p. 159; Peachey, Settlements, p. 751; Vaizey, Settlements, pp. 1052, 1218; Key and Elphinstone (ed. 1894), vol. ii., pp. 483, 798. The reason given for this opinion is that by the appointment the share is taken out of the settlement. Lord Romilly, however, has pointed out that though by an advancement property is taken out of a settlement, the same is not true of an appointment: *In re Gosset's Settlement* (1). Compare *White* v. *Grane* (2).

As against the opinion expressed by the conveyancers, it would appear to be a question of intention: *De Lusi's Trusts* (3); and if this deed of appointment and this will be read together, the advancement clause in the latter will clearly apply to the share appointed by the former, because the appointed share is now a "vested share."

If the power of advancement applies the question arises, is the proposed application of the money, when raised, a proper application?

Stanley, Q.C., for Charles Louis Gaussen:—

The donees have executed an irrevocable appointment to my client. This appointment must be read into the testator's will. The power to advance portion of a "vested share" must apply to an appointed share, because no share vests until an appointment is made. Mr. Davidson says wrongly (vol. iii., pt. i., p. 159), that where an appointment is made the fund so appointed is taken out of the settlement. This appears to be based on a passage in Farwell on Powers (2nd ed., p. 288), which refers to a different question, namely, the case where the entire capital is dealt with, and some object fails. That question arose in *De Lusi's Trusts* (3).

The appointment should be read as part of the original instrument creating the power: *Pinède's Settlement* (4); *Van Hagan's Trusts* (5); *Osborne* v. *Holyoake* (6).

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(1) 19 Beav. at p. 535.
(2) 18 Beav. 571.
(3) 3 L. R. Ir. 232.
(4) 12 Ch. D. 667.
(5) 16 Ch. D. 29.
(6) 22 Ch. D. 239.

As to the proposed application of this money, the testator uses the words "advancement or benefit." "Benefit" is wider than "advancement": *Lowther* v. *Bentinck* (1), where it was held that the trustees might apply a moiety of the trust funds in payment of debts of the *cestui que trust*.

THE VICE-CHANCELLOR :—

I think that the appointment must be read into the will, and operates as if the appointee's name appeared in the will. I cannot see why all the powers in the instrument creating the power should not apply to the appointed share. There is nothing to take the appointed share out of the powers which would apply to an unappointed share, and that gives a meaning to "vested."

I decline to give any opinion on the second query, that being a matter for the discretion of the trustees. I agree with Mr. Stanley that "benefit" is much wider than "advancement."

Costs of the summons to be paid out of the trust fund.

Solicitor: *John A. French.*

T. H. M.

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(1) L. R. 19 Eq. 166.

Appeal.
1895.
June 13, 14, 18, 19, 20, 29.

PORTER *v.* WALSH (1).

(1894. No. 696.)

Donatio mortis causa—*Deposit receipt unindorsed.*

APPEAL by the defendants from the decision of the Vice-Chancellor, reported [1895] 1 I. R. 284.

The Attorney-General (*The Right Hon. The MacDermot, Q.C.*), and *Sullivan, Q.C.* (with them *Bushe, Q.C.*, and *Healy*), for the appellants.

The Right Hon. John Atkinson, Q.C., and *Ronan, Q.C.* (with them *Jefferson*), for the respondent.

Cur. adv. vult.

June 29.

THE COURT OF APPEAL unanimously affirmed the judgment o the Vice-Chancellor, and dismissed the appeal, with costs.

Solicitor for the defendants: *Chance.*
Solicitor for the plaintiff: *Shannon.*

G. Y. D.

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(1) Before WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

BANNATYNE *v.* FERGUSON.

(1892. No. 276.)

V.-C.
1895.
Feb. 20, 21.
April 18.

Appeal.
Nov. 29.
Dec. 2, 6.

Deed—Construction—Agreement out of "first and readiest of means" to pay annuity—Whether a charge on property—Subsequent grant of jointure under a power, whether a performance.

By a contract of marriage, executed in Scotland, and dated the 8th August, 1850, on the marriage of J. S. and E. E., J. S. bound himself, his heirs, executors, and successors, out of the first and readiest of his means, estate, and effects, to make payment to the said E. E. in case she should survive him, of a free life-rent annuity of £200, free of all burdens and deductions, at two terms in the year (Whitsunday and Martinmas), by equal portions, the first payment to be made at the first of these terms after the death of J. S., with one-fifth more of penalty in case of failure of payment; this annuity to be in full of all terce of lands, third or half of moveables; and, after making certain provisions for the children of the marriage, the deed provided that if the said E. E. survived the said J. S. a sufficient sum from his estate and effects should be laid aside and secured for answering the annuity before the children should draw any part. For securing performance of the aforesaid obligations F. S. (the father of J. S.) bound himself and his heirs for payment to E. E. of £100 a-year, one-half of the aforesaid annuity, and agreed to execute any deed necessary for securing payment thereof out of the lands of T. in the county of Kerry, and J. S. bound himself to insure his life for £1500 to secure the balance of the annuity. J. S. further bound himself, within a year of his father's death, to secure on real property the payment of the said annuity to the full amount, at least so far as not secured by F. S., and J. S. covenanted to execute such deeds as might be necessary for the performance of the aforesaid obligations. The deed also contained provisions settling E. E.'s fortune.

F. S. by will, dated the 11th February, 1861, devised his real estate in the county of T. to his eldest son W. S. for life, with remainder to his sons in tail male, with remainder to J. S. for life, with remainder to his sons in tail male, with remainder to G. S. for life, with remainders over, with power to each successive tenant for life to charge a jointure of £200 a-year for any wife he might marry. F. S. died in 1861 without having executed any deed for securing payment of the £100 a-year, half of the annuity, and W. S. died in March, 1889, leaving no issue him surviving.

By indenture dated the 1st May, 1889, J. S. in exercise of the power in the will, charged the estates with a jointure of £200 a-year for his wife E. S., to commence from the date of his death, payable half-yearly by two equal payments. In an action to administer the assets of J. S., E. S. claimed that the entire of his real and personal estate was chargeable with the annuity of £200 a-year under the marriage contract of the 8th August, 1850, in priority to the general creditors of J. S. :—

Held, by the Vice-Chancellor and by the Court of Appeal, that the marriage contract of the 8th August, 1850, did not create a charge on the property of J. S.

Held, also, by the Court of Appeal, reversing the decision on this point of the Vice-Chancellor, that the appointment of the jointure by the deed of the 1st May, 1889, was not a performance of the contract to secure the annuity by the marriage contract of 1850.

By a contract, dated the 8th August, 1850, and made between James Spaight of Limerick and Elizabeth Alason Eckford, residing in Edinburgh, with the consent of Mrs. Flora Eckford, Miss Elizabeth Eckford, and Patrick Stevenson her guardians, the said James Spaight, in contemplation of a marriage between himself and the said Elizabeth Alason Eckford, bound and obliged himself, his heirs, executors, and successors whomsoever, out of the first and readiest of his means, estate, and effects, to make payment to the said Elizabeth A. Eckford in case she should survive him of a full life rent annuity of £200 sterling free of all burdens and deductions whatever, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment at the first of these terms that should happen after the decease of the said James Spaight for the half-year immediately following, and soforth thereafter during her lifetime, with a fifth part more of penalty in case of failure in payment, and the legal interest of the said annuity from and after the respective terms of payment during the non-payment. In case the said Elizabeth A. Eckford survived her husband and married again during the existence of a child or children of the present intended marriage then the annuity should be restricted to the sum of £100 ; but if there should be no children in existence at the time of the second marriage, or if such child or children should die then the annuity to be restricted to £150. And it was declared that the said annuity should be payable to the said Elizabeth Alason Eckford over and above her own fortune :

V.-C.
1895.

BANNATYNE
v.
FERGUSON.

and further, the said James Spaight provided, disponed, and assigned to Elizabeth A. Eckford, in case she survived him, as her absolute property, failing children, the whole household goods and furniture which should belong to him at the time of his death, including silver, plate, china, bed and table linen, books, pictures, liquors, and heirship moveables, and as trustee for children, if any, and that without the burden of any debts affecting the same; and further the said James Spaight bound and obliged himself and his foresaids to make payment to Elizabeth A. Eckford, in case of her surviving him, of £100 for mournings and for ailment and support until Whitsunday or Martinmas that should first happen after his death when her annuity was to commence; which provisions above written the said Elizabeth A. Eckford accepted in full of all terce of lands, heritage, third or half of moveables, *jus relictæ*, mournings, ailment, and everything else which she could claim or succeed to through the decease of the said James Spaight in case of her surviving him; and for provisions to the child or children that might be born of the marriage James Spaight bound and obliged himself and his foresaids to provide and secure, and thereby gave, granted, and disponed to such child or children three-fourths of the whole estates, means, and effects, real or personal, which should belong to him at the time of his death to be divided among them as he should appoint, and failing such division in equal shares. It was also provided that if Elizabeth A. Eckford should survive the said James Spaight a sufficient sum from his estate and effects should be laid aside and secured for answering her said annuity before the said children should draw any part; and further, the said James Spaight bound and obliged himself and his foresaids to educate and maintain the child or children of the marriage suitably to their rank and station in life until their foresaid provisions should become due, &c. And for securing so far implement and performance of the obligations above written by the said James Spaight in favour of the said Elizabeth A. Eckford, Francis Spaight (father of said James Spaight) bound and obliged himself and his heirs and successors for payment of the annuity to the said Elizabeth A. Eckford, and that to the extent of £100 sterling thereof yearly, payable in the event, at the terms, and with interest and penalty as thereinbefore provided; and Francis Spaight bound and obliged himself to execute and deliver all such deeds as might be necessary by law for effectually securing the payment thereof out of lands, houses, and premises at Tarbert in the county of Kerry. The said James Spaight bound and obliged himself to insure his life to the extent of £1500, and to take the policy in the name of the trustees thereinafter appointed, and to pay the premiums on the policy, the interest of the proceeds of the policy in the event of his death, and before securing on real property the payment in full of said annuity as thereinafter provided, to be applied towards payment of the annuity so far as not secured by the obligation aforesaid of the said Francis Spaight, the balance of said annuity to be provided for otherways by the said James Spaight; and the principal sum of the proceeds of said policy to be held by the said trustees for behoof of the children of the marriage, whom failing, the said James Spaight and his heirs; and the said James Spaight bound and obliged himself and his foresaids within a reasonable time, but not exceeding one year after the death of his father, in the event of surviving him, to secure to the said Elizabeth A. Eckford on real property the payment of said annuity to the full amount thereof as thereinbefore provided, at least so far as not secured by the said Francis Spaight as aforesaid, and that in such terms as by the advice of counsel should be held and deemed sufficient and proper to afford absolute and effectual security to her for the payment thereof; and upon such real security being given to the satisfaction of said trustees they should hold the said policy for behoof of the children of the said intended marriage, whom failing the said James Spaight and his heirs; and seeing that the said James Spaight resided forth of Scotland, and on that account it might be thought advisable and necessary that the obligations in the present contract should be renewed and confirmed by a marriage settlement or other deed in the Irish form, therefore the said James Spaight engaged and covenanted and bound and obliged himself, when requested by the said trustees, to execute and deliver any deed or deeds in the Irish form which counsel should direct for more effectually binding him in the performance of the several obligations incumbent upon him by the present contract in favour of his said intended wife and children, and for securing the same to them in manner above written.

Then followed provisions for settling Miss Eckford's fortune which was substantial. She and James Spaight had a joint tenancy for life; and if she predeceased James Spaight and there were no children it went to her appointees; and in default of appointment, one-half was to go to her, and one-half to James Spaight; in the event of James Spaight predeceasing Elizabeth A. Eckford and failing a child of the marriage or who should arrive at majority, &c., then the trust funds should on such failure belong to the said Elizabeth A. Eckford absolutely.

Francis Spaight (the father of James) by will, dated the 11th February, 1861, devised his real estates of Derry and Burgess in the county of Tipperary to his eldest son William Spaight for life, with remainder to his sons in tail male, with remainder to James Spaight for life, with remainder to his sons in tail male, with remainder to George Spaight for life, with remainder to his sons in tail male; and there was a power to each successive tenant for life to charge a jointure of £200 a-year for any wife whom he might marry.

Francis Spaight died in 1861 without having executed any deed for securing payment of the annuity to the extent of £100 yearly as he contracted to do; and William Spaight died on the 31st March, 1889, leaving no issue him surviving.

By indenture dated the 1st May, 1889, and made between the said James Spaight, then Sir James Spaight, of the first part, Lady Elizabeth Spaight, formerly Elizabeth A. Eckford, of the second part, and James Fitzgerald Bannatyne and Thomas James Ferguson of the third part, the said James Spaight, in consideration of natural love and affection and in exercise of the power given to him by the said will, appointed that the said estates should remain and be to the use and upon trust that Lady Elizabeth Spaight, if she survived him, should receive thereout during her life by way of jointure the yearly rentcharge or annual sum of £200 to commence from the date of his death, by two equal half-yearly payments, the first payment to be made at the end of six calendar months from the death of Sir James Spaight.

Sir James Spaight died on the 21st January, 1892, and the present action was brought by a creditor to administer his real and personal estate.

Lady Elizabeth Spaight lodged a claim at chambers, claiming (amongst other things) that the entire of the real and personal estate of Sir James Spaight was chargeable in priority to all other creditors with, and applicable as a fund to meet, the annuity of £200 a year for the life of Lady Elizabeth Spaight in accordance with the covenant and provisions contained in the deed of the 8th August, 1850.

The case having been placed in the Vice-Chancellor's chamber list for his opinion on (amongst others) the questions whether the said estate was so chargeable, and whether the deed of the 1st May, 1889, operated as a satisfaction or performance of the obligations of Sir James Spaight under the marriage contract, was subsequently adjourned into Court.

Serjeant Jellett, Q.C., and *W. M. Jellett*, for Lady Spaight.

Kenny, Q.C. (with him *Oulton*), for Thomas James Ferguson, the executor of Sir James Spaight.

Ronan, Q.C., and *H. D. Conner*, for George Spaight, who was interested in resisting claims against the estate.

[The following were referred to: *Metcalfe* v. *Archbishop of York* (1); *Lyster* v. *Burroughs* (2); *White* v. *Anderson* (3); *Stack* v. *Royse* (4); *Galavan* v. *Dunne* (5); *Hardey* v. *Green* (6); *Mornington* v. *Keane* (7); *Ex parte Bolland; In re Clint* (8); *Tailby* v. *Official Receiver* (9); *In re D'Epineuil* (10); *In re Turcan* (11); *Goldsmid* v. *Goldsmid* (12); *Martyn* v. *Blake* (13).]

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(1) 1 My. & Cr. 547.
(2) 1 Dr. & Wal. 149.
(3) 1 Ir. Ch. R. 419.
(4) 12 Ir. Ch. R. 246; 13 Ir. Ch. R. 213.
(5) 7 L. R. Ir. 144.
(6) 12 Beav. 182.
(7) 2 D. & J. 292.
(8) L. R. 17 Eq. 115.
(9) 13 App. Cas. 523.
(10) 20 Ch. Div. 758.
(11) 40 Ch. Div. 5.
(12) 1 Swanst. 211.
(13) 3 Dr. & War. 125.

V.-C.
1895.
BANNATYNE
v.
FERGUSON.
April 18.

THE VICE-CHANCELLOR :—

The first question I am called on to decide is whether the entire real and personal estate of the late Sir James Spaight is chargeable in priority to all other creditors with the annuity of £200 for the life of Lady Spaight, intended to be provided for her by Sir James Spaight, as agreed by the contract executed on their marriage, dated the 8th August, 1850. This depends on the construction of that instrument, which being prepared and executed in Scotland, is worded in language probably familiar in legal instruments in that country, but which is certainly different from our legal phraseology. I must construe it according to the law of this country, as there has been no proof of any difference between the laws of the two countries in this respect, nor of what that difference, if any, consists. The real question arising upon it is whether it contains words of actual charge to take effect by the instrument itself, or amounts only to a covenant or agreement by Sir James Spaight to pay the annuity, and to create a charge by some other instrument to be executed by him for the purpose. The cases of *Lyster* v. *Burroughs* (1), *White* v. *Anderson* (2), *Stack* v. *Royse* (3), and *Galavan* v. *Dunne* (4), establish a rule which is conclusively binding on this Court, that words showing a present intention to charge the property, real or personal, which the person intending to create the charge then is possessed of, or shall afterwards become entitled to, in favour of another for valuable consideration, may, though in general terms, effectually attach upon all such property whenever acquired, in priority to subsequent charges, and in administration of assets in priority to all general debts and liabilities of the deceased. On the same principle the important case of *Tailby* v. *The Official Receiver* (5), was decided by the House of Lords reversing the cases of *Belding* v. *Read* (6) and *In re D'Epineuil* (7), and explaining the language of Lord Westbury in *Holroyd* v. *Marshall* (8), and approving of the decision in *Coombe* v. *Carter* (9).

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(1) 1 Dr. & Wal. 149.
(2) 1 Ir. Ch. R. 419.
(3) 12 Ir. Ch. R. 246; 13 Ir. Ch. R. 213.
(4) 7 L. R. Ir. 144.
(5) 13 App. Cas. 523.
(6) 3 H. & C. 955.
(7) 20 Ch. Div. 758.
(8) 10 H. L. Cas. 191.
(9) 36 Ch. D. 348.

But to bring this rule into operation it is necessary that words of charge are found in the instrument and are intended to operate without more to create the charge, and not merely as a covenant or agreement to create such charge by some further act of the party. This distinction is pointed out and affirmed by the case of *Mornington* v. *Keane* (1), where there was a covenant by Lord Mornington with the trustee of a separation deed, that he would on or before a certain day effectually secure, either by a charge on freehold estates of adequate value, or by investment of an adequate sum of money in stock, or by the best means which might then be in his power, the payment of an annuity for his wife. The case was argued for the plaintiff on the principle of equity considering done that which ought to be done, and that a covenant to charge is in equity equivalent to an actual charge. For the defendant it was contended that the whole question was one of the construction of the covenant, whether the intention of the parties to the deed was that a charge should be created without more being done, and that the words of the covenant there imported no such thing as a charge, and that they amounted only to a personal engagement to do a particular act. The defendant's counsel then went through the several clauses of the deed to show that the context, so far from controlling the natural import of the words of the covenant, strongly supported it. Lord Chelmsford, L. C., in his judgment states that the covenant itself was apparently of a personal nature, not purporting to create any charge *ipso facto*, but providing for an act to be done, whereupon the charge was to arise; that he could well understand a distinction between cases where a certain charge is created, and those where there is only a covenant to do an act whereby a charge will be created; and that to a plain and ordinary understanding a covenant of the kind imports nothing beyond binding the covenantor to create a charge on some property. Knight Bruce, L.J., concurred in this view, stating he was of opinion that according to the true construction of the agreement it did not create a charge or lien on any part of Lord Mornington's property. Turner, L. J., also concurred, and stated that the question was,

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(1) 2 D. & J. 292.

Is there, or not, an agreement to charge the property against which the claim is sought to be enforced, either by the terms of the covenant or by virtue of any act in performance or satisfaction of the covenant?—that the question whether there is an agreement by the terms of the covenant depends on the language of the deed; and that in considering that question it had always appeared to him to be of great importance to see whether the deed was to have immediate operation, or whether the covenant is to have operation by a future act to be done by the covenantor. That case was referred to by Lord Macnaghten in his judgment in *Tailby* v. *The Official Receiver* (1), without dissent or disapproval. I apprehend that it correctly lays down the rule of law on the subject.

I shall, therefore, examine the instrument in the present case to endeavour to ascertain its true nature and the intention of the parties. It is expressed to be a contract and agreement between the parties in contemplation of the marriage, and James Spaight "binds and obliges" himself, his heirs, executors, and successors, out of the first and readiest of his means, estate, and effects, to make payment to his intended wife, in case she should survive him, of an annuity of £200 for her life, from his death, reducible in case of her marrying again. Stopping here for the present, the question at once arises—what is the nature of this obligation? In ordinary language it seems to be a personal obligation or covenant by James Spaight that his heirs and executors should pay £200 a year to his widow. The annuity was not to be payable till his death, and could not therefore take effect as a charge created by this instrument on his property in his lifetime. There are no words of charge, nor even of agreement to charge his property in his lifetime, or his assets, specifically, at his death. I cannot give the effect contended for by Lady Spaight to the words, "out of the first and readiest of his means, estate, and effects," namely, that they create a specific charge, and I certainly find it hard to give them any operative meaning. Then, James Spaight "further provides, dispones, and assigns" to his intended wife, in case she survives him, as her absolute property, failing children, the household goods and furniture which should belong to him at his death, and that without the burden of any debts affecting the same. This, which I hold to be a valid disposition, is very differently worded from the prior clause, and shows that the parties had before them the possibility of making a present settlement of so much of the personal estate of James Spaight at his death, and they carry this into effect in terms in the latter clause, while they omit to do so in the former. The express exoneration of this portion of his assets from payment of his debts, raises a further doubt whether any such advantage was intended to be secured for the annuity, even by the words, " out of the first and readiest of his means, estate, and effects." The next clause I refer to is that where James Spaight " binds and obliges himself and his foresaids " to make payment to his wife, surviving, of £100 for mournings, &c., which is in similar terms to those of the covenant or agreemant for payment of the £200 a-year, and seems to me to rest in personal covenant. The intended wife accepts of the " provisions above written " in lieu of dower thirds, &c.

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(1) 13 App. Cas. 523, at p. 548.

The instrument then proceeds to deal with provisions for the children of the marriage, and although there have not been any, these provisions may throw some light on the other questions. James Spaight binds and obliges himself and his foresaids to provide and secure, but he adds, " and hereby gives and dispones " to such children three-fourths of the whole estates, means, and effects real or personal which shall belong to him at his death. This is followed by a proviso that, if his wife should survive him, a sufficient sum from his estate and effects should be laid aside and secured for answering her said annuity before the said children should draw any part. If the obligation to pay the annuity was by the prior part of the deed made to take effect by way of specific charge on all his property, real and personal, there would not be any need for such a proviso, for the children could take nothing till the annuity so specifically charged had been provided for. Next, James Spaight " further binds and obliges himself " to educate and maintain the children suitably to their rank and station in life until their foresaid provisions should become due, &c. It seems to me clear that this rests solely on the personal covenant and agreement of James Spaight, and the terms in which it is expressed are identical with the provision as to the annuity.

The instrument then proceeds to provide additional security, for payment of the annuity agreed to be given, by Francis Spaight father of James Spaight, who "binds and obliges himself, his heirs, and successors" for payment of the annuity to the extent of £100 a-year; and "binds and obliges himself" to execute all such deeds as may be necessary for effectually securing the payment thereof out of certain specified lands and premises. Here Francis Spaight's covenant which is certainly personal, is expressed in the same operative words as those by James Spaight.

Then follows a clause in which James Spaight "binds and obliges" himself to insure his life and take out a policy in the names of trustees and to pay the premiums, the interest of the proceeds of the policy, in the event of his death *before securing on real property the payment in full of the said annuity*, to be applied towards payment of the annuity, *so far as not secured* by the obligation aforesaid of Francis Spaight, the balance of the annuity to be provided for otherways by the said James Spaight. This appears to me to express the intention of the parties that the contract of James Spaight for payment of the annuity was personal only, and that it contemplates the securing the annuity as a thing to be done partly by the carrying out by Francis Spaight by a future act of his covenant to charge £100 on his property; partly by the effecting the proposed insurance, and so far as these should not suffice by James Spaight also by a future act charging it on real property of his own.

Then comes a further obligation by James Spaight which is of much importance on this question, namely, that he "binds and obliges" himself within a year from the death of his father to secure to the intended wife on real property the payment of the annuity to the full amount, at least so far as not secured by Francis Spaight as aforesaid, "and that on such terms as by the advice of counsel should be deemed sufficient to afford absolute and effectual security to her for payment thereof." This clause shows what was contemplated in the preceding as to the securing the annuity by James Spaight on real property, and necessarily contemplates this as a future act. There is, lastly, as far as this question is concerned, a covenant by James Spaight in these terms. [His Lordship read the last covenant: see *supra*, p. 152.]

Upon a careful consideration of the language of this instrument, I am of opinion that it was not intended to operate, and did not operate to charge specifically the general property of Sir James Spaight; that it rested in personal contract by him to pay the annuity and to further secure it by acts to be done by himself and his father Francis Spaight, outside the instrument itself. I must therefore hold that Lady Spaight is not entitled to any specific charge on the assets of her husband and that she can only come in and prove for damages for breach of the covenant *pari passu* with the other general creditors.

The second question is whether the execution by James Spaight of the deed of the 1st May, 1889, operated as a satisfaction of his obligations as to the annuity under the instrument of the 8th August, 1850. That deed on its face is simply an appointment by James Spaight under a power in the will of his father Francis Spaight to charge estates devised thereby in strict settlement, under which James Spaight became tenant for life in possession on the death of his brother William Spaight on the 31st March, 1889, with a jointure not exceeding £200 a-year for any wife he might marry. He in consideration of natural love and affection and in exercise of the power so given him appointed that these estates should stand charged, in case his wife should survive him, with a jointure rentcharge of £200 for her life. No reference is therein made to the instrument of the 8th August, 1850, or to any contract or obligation of either James Spaight or his father the testator, nor anything to indicate in terms that the power was exercised in performance of any obligation to provide or secure a jointure for Lady Spaight. The question therefore is whether James Spaight being bound to secure to his wife on real property the payment of an annuity of £200 so far as not secured by the testator, Francis Spaight, is to be deemed to have performed or satisfied that obligation by the exercise of a power to charge an annuity of £200 for his wife on his father's estates. He was under no obligation to exercise this power. He was bound to secure an annuity of £200 a-year so far as the same was not secured by

Francis Spaight. Francis Spaight died without securing any portion of it, therefore the full amount was to be secured by James Spaight. Lady Spaight was entitled to have one annuity of that amount provided for her and secured by James Spaight on real property. She got this by the appointment of 1889, and now she claims to have another annuity of the same amount in addition. This Court always leans against double provisions, but without relying on this principle as conclusively ruling this case, the question is one of intention, and I think, that in the absence of any extrinsic evidence either way, there is enough in the transaction itself to justify an inference that Sir James Spaight, when he executed the appointment, intended thereby to perform his covenant to that effect in the marriage contract.

The principles on which this Court deals with such cases are expressed in the leading case of *Goldsmid* v. *Goldsmid* (1), where, in articles executed on marriage, the husband covenanted, that in case he should die in his wife's life, his executors should, within three months from his death, pay her £3000. He died in his wife's life-time, practically intestate, and his assets were distributable under the Statute of Distributions, and his wife's distributive share was more than £3000. This was held to be a performance by him of his covenant, on the settled rule that, in cases of absolute intestacy, the distributive share of the widow is considered as performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. In the present case there seems to me stronger ground for holding that there has been a performance, because, in cases like *Goldsmid* v. *Goldsmid* (1), there was nothing more than the liability of the husband's assets to make the stipulated provision for his widow, and his intestacy, which entitled her to an adequate share of his assets; whereas here there is such a close correspondence between the thing stipulated and the thing performed, that it may be fairly concluded that one was intended to perform the other. I cannot hold that the mode adopted by Sir James Spaight of performing or satisfying his

(1) 1 Swanst. 211.

V.-C.
1895.
BANNATYNE
v.
FERGUSON.

obligation by the exercise of a power by means of which she got what she contracted for, takes the case out of the principle I have mentioned. It was relied on by Lady Spaight that this could not be a performance because it was not done within the year from the death of Francis Spaight mentioned in the covenant, but many years after. But it must be borne in mind that the substance of James Spaight's obligation was to secure the annuity by a sufficient charge on real property; and that, although the contract plainly contemplated the death of Francis Spaight as the event on which James Spaight would become in a position to fulfil this obligation, it afterwards proved, on the will of Francis Spaight, that the limitations to William Spaight and his issue were interposed before James Spaight took anything in the estates, and that James Spaight was given no power of jointuring unless, and until he came into possession. This only happened on the death of William Spaight, without issue, on the 31st March, 1889, and the appointment was made in the month of May following. Some trifling differences were also relied on as to penalty for want of punctual payment, and as to the annuity being free of all burdens and deductions, to which I can give no weight. I must, therefore, hold that the charge of the jointure of £200 by the deed of 1st May, 1889, was a performance by Sir James Spaight, of his contract to secure the annuity. [His Lordship then dealt with the other questions brought before him.]

D. M'C. M.

Appeal.
1895.
Nov. 29.
Dec. 2, 6.

Lady Spaight appealed (1).

Serjeant Jellett, Q.C., and *W. M. Jellett*, for the appellant:—

1. This covenant of James Spaight to grant an annuity of £200 a year secures that annuity on his future-acquired personal estate, so as to bind his personal estate in preference to his general creditors. The words of the marriage contract are "out of the first and readiest of his means, estate, and effects to make payment."

In *Lyster* v. *Burroughs* (2) specific execution was decreed, at the suit of the wife of a bankrupt against the assignees of a covenant, and it was there held that such a covenant will bind both real and personal estate. That was followed in *Anderson* v. *White* (1), in *Stack* v. *Royse* (2), and *Galavan* v. *Dunne* (3). To the same effect is *Ravenshaw* v. *Hollier* (4). The covenant here binds all "his means, estate, and effects," and what is in form a covenant is in reality a charge; the true meaning of the obligation to make payment "out of the first and readiest of his means, estate, and effects," must be that those who take the personal property take it charged with this annuity. *Metcalfe* v. *Archbishop of York* (5) decided that a good charge could be created on a future benefice.

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(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L.JJ.

(2) 1 Dr. & Wal. 149.

2. The grant of the jointure by the deed of 1st May, 1889, is not a performance of the covenant in the marriage contract, because the annuity is essentially different from the jointure in several respects: (*a*) it was to be free from all burdens and deductions, the person therefore taking it would be free from legacy duty and succession duty: *Dawkins* v. *Tatham* (6); *Lovat* v. *Duchess of Leeds* (7): (*b*) it was to carry a penalty with it of one-fifth part more in case of failure of payment and the legal interest of the arrears of the said annuity; arrears of an annuity do not bear interest except by contract: *Martyn* v. *Blake* (8): (*c*) the annuity was to commence on the Whitsuntide or Martinmas after his death payable in advance, and £100 for mournings, &c., was to be paid at once; the jointure was to run from the date of his death. Had the appellant sued at law for the annuity, the executors could not have pleaded the jointure as a performance, *Roakes* v. *Manser* (9). But apart from the differences between the two, which are substantial, a man cannot satisfy and perform his own obligation out of the property of another: *Roberts* v. *Dixon* (10), *Sir W. Davies' Case* (11), *Walpole* v. *Lord Conway* (12), *Graham* v. *Wickham* (13). The deed of 1st May, 1889, charged the property of Francis Spaight only.

(1) 1 Ir. Ch. R. 419.

(2) 12 Ir. Ch. R. 246; 13 Ir. Ch. R. 213.

(3) 7 L. R. Ir. 144.

(4) 7 Sim. 3.

(5) 1 My. & Cr. 547, 556.

(6) 2 Sim. 492.

(7) 2 Dr. & Sm. 62.

(8) 3 Dr. & War. 125.

(9) 1 C. B. 531.

(10) Eq. Cas. Abr. 668, under the title Powers.

(11) 5 Vin. Abr., Title Condition, 292; Placitum, 38.

(12) Barnard, 156.

(13) 1 De G. J. & Sm. 474.

Kenny, *S.-G.* (with him *Oulton*), for T. J. Ferguson; and *Ronan*, *Q.C.*, for George Spaight:—

This clause in the deed is a covenant and not a charge, and so the appellant can only claim *pari passu* with the other creditors. The word "charge" is nowhere to be found in the deed. It is not competent for a man by law to create a charge on his future personal estate so as to defeat the rights of his creditors. *Stack* v. *Royse* (1) did not deal with personal estate. In *Galavan* v. *Dunne* (2), Sir E. Sullivan declined to express any opinion on the question himself, but felt bound to follow the decisions of *Lyster* v. *Burroughs* (3) and *Anderson* v. *White* (4). The English decisions are to the contrary effect: *Ex parte Bolland* (5). In *Tailby* v. *Official Receiver* (6) it was held by the majority of the House of Lords that a covenant to bind one particular class of future-acquired personalty, *e.g.*, book debts is good, but a general charge would be bad.

The deed of 1st May, 1889, is a performance. It is not necessary that there should be an exact performance; there can be a performance *pro tanto*, though there must be something to which the law will attribute an intention to satisfy the obligation: *Thacker* v. *Key* (7); *Garthshore* v. *Chalie* (8). *Graham* v. *Wickham* (9) does not apply because that was only a case of a power of distribution.

Dec. 6.

LORD ASHBOURNE, C.:—

This is an appeal from an order of the Vice-Chancellor, and involves the consideration of two important questions; the first is whether the entire real and personal estate of the late Sir James Spaight is chargeable in priority to all other creditors with an annuity of £200 a year for the life of Lady Spaight, under the contract entered into on their marriage on the 8th August, 1850—in other words, what is the construction of that document? The controversy is, does the language amount to more than a covenant

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(1) 12 Ir. Ch. R. 246; 13 Ir. Ch. R. 213.
(2) 7 L. R. Ir. 144.
(3) 1 Dr. & Wal. 149.
(4) 1 Ir. Ch. R. 419.
(5) L. R. 17 Eq. 115.
(6) 13 App. Cas. 523.
(7) L. R. 8 Eq. 408
(8) 10 Ves. 1.
(9) 1 De G. J. & Sm. 474.

Appeal.
1895.
BANNATYNE
v.
FERGUSON.
Lord
Ashbourne, C.

or agreement by Sir James Spaight to pay the annuity, and to create a charge by some other and later instrument to be executed for that purpose, or should it be construed as containing an actual charge to take effect by the document itself? We intimated, before the argument for the respondent had closed, that we concurred with the Vice-Chancellor in thinking that the words did not create a charge. I myself arrive at that conclusion on the consideration of the whole instrument, and the construction of all the clauses, which have been referred to in detail by the learned Vice-Chancellor in his judgment. It is not necessary for me therefore to examine in detail the numerous authorities referred to on this part of the case by Mr. Serjeant Jellett. If we had reached the conclusion that the words in themselves amounted to, and were intended to be, a charge, then the cases going to show that effect should be given to such a provision would apply. Words creating, and intending to create, a charge on future specified personal property such as book debts, or moneys coming under settlements or wills, have been given effect to in cases of the highest authority and are open to no doubt or question. But words seeking to charge all the future personalty—quite open and indefinite—have also come before the Courts, and there are many cases on the subject. I do not think that the recent cases are as strong as the earlier ones in favour of the enforceability of such charges, and we can notice much reserve in the language of later judgments on the subject. In *Galavan* v. *Dunne* (1), Sir E. Sullivan, M. R., followed the previous authorities, not adding a word to indicate his own opinion or approval. In *Coombe* v. *Carter* (2), where a mortgage covered " all moneys of or to which the mortgagor was or might during the security become entitled, under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next-of-kin of his father or any other person or persons," Lord Justice Bowen and Lord Justice Cotton used words of measured caution on the subject, and deliberately left open the validity of a charge on future personal property generally. In *Belding* v. *Read* (3), all the Exchequer Judges practically

(1) 7 L. R. Ir. 144. (2) 36 Ch. Div. 348. (3) 3 H. & C. 955.

repudiated the doctrine, and Pollock, C. B., said broadly that there "cannot be a prophetic conveyance." The case of *Tailby* v. *The Official Receiver* (1) is one of much interest as well as of the highest authority. That case dealt with "future book debts" which were held to be "perfectly definite," and not either too vague or too wide, and while over-ruling *Belding* v. *Read* (2), affirmed *Coombe* v. *Carter* (3). Lord Herschell, in commenting on the latter case, pointed out that the Court of Appeal had left open the question whether a disposition of all the present and future personalty of the person giving the charge would be enforced in equity, and added with caution—"I think your Lordships may also be content to put aside this point, which certainly does not arise in the case before you." But arriving at the conclusion that on the construction of the instrument the words do not create a charge, I am not called on to do more than imitate the caution of the distinguished Judges I have referred to, and not express an opinion on the convenience, or policy, or equity of giving effect to the words, if they amounted to more than a personal covenant.

The second question in the case is:—Was the covenant performed by the deed of 1889, giving a jointure of £200 a year to Lady Spaight? Satisfaction would require a clear intention, and it is really not suggested that there was satisfaction, but it is argued strenuously that there was performance. Even then intention and probable intention is not to be entirely ignored. What is it that had to be performed? A covenant by Sir James Spaight to pay "out of the first and readiest of his means, estate, and effects" an annuity of £200 (1) in advance, (2) with interest on the arrears, (3) with substantial penalty for unpunctual payment. How is this covenant said to be performed? By the exercise of a jointuring power to the extent of £200 a year—with different gale days, and without any of the three special advantages I have named. For performance the thing done should be equal to the thing promised. Here it falls substantially short. Assuming the estate to be entirely solvent, and that Lady Spaight was asked whether she would take the jointure in lieu of the covenant, her answer would be promptly given in the negative, on the ground that it was far less valuable. It is not decisive, but it is an element to be noted, that the deed of 1889 never makes the slightest allusion to the marriage contract of 1850. The whole strain of the argument is thrown on the fact that the jointure is for the sum of £200, the figure named in the covenant. There is really nothing else. But the tendency against double portions is so strong that if Sir James Spaight himself, out of his own moneys and property, secured a jointure of £200 for Lady Spaight, I would feel very seriously impressed with the argument that the jointure should be regarded as a performance of his covenant. But what are the facts? Francis Spaight, the father of William, James, and George Spaight, by his will dated the 11th February, 1861, gave each of them, if and when he became tenant for life of his estates in the county of Tipperary, the power of jointuring a wife to the extent of £200 a year. The testator died in 1861, and was succeeded by his eldest son, William Spaight, who, dying without issue in 1889, was succeeded by his next brother, Sir James Spaight, who, by deed of the 1st May, 1889, executed the jointuring power in favour of his wife up to the limit named by his father—£200 a year. How can, or why should, the exercise of this power, conferred by another man out of another man's property, be deemed a performance of his own covenant to provide an annuity for his wife out of his own "means, estate, and effects"? To my mind this is the strongest and most cogent ground against holding that the deed of 1889 was a performance of the covenant in the deed of 1850. In Farwell on Powers (page 396) it is stated—"Satisfaction on the ground of the leaning against double portions can only arise when both portions issue from one and the same person." For this the cases cited by Serjeant Jellett are referred to —*Sir William Davie's Case* (1) and *Walpole* v. *Lord Conway* (2). In the present case both portions do not issue from one and the same person, the annuity under the contract of 1850 was to issue from the means of Sir James Spaight, whilst the jointure was to issue from the property of Francis Spaight. With great deference to the Vice-Chancellor, I do not think that the case of *Goldsmid* v. *Goldsmid* (3) applies to the particular facts of the present case, although the decision was natural and to be expected under its own circumstances. I therefore think that the Vice-Chancellor's decision should be affirmed on the first, but varied on the second point, and that the appeal to that extent must be allowed.

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(1) 13 App. Cas. 523. (2) 3 H. & C. 955. (3) 36 Ch. Div. 348.

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(1) 5 Vin. Abr. 292. (2) Barn. 156. (3) 1 Swanst. 211.

FITZGIBBON, L.J. :—

As we hold that the marriage contract of 1850 created the relation only of creditor and debtor, and not that of owner of a charge and owner of a charged estate, in respect of Lady Spaight's annuity, we have not to decide the important questions which have been discussed, as to the validity or effect of general charges. A man may purport, in terms, to charge all real and personal property which may at any time come to his hands; in short, he may purport to create a hovering charge which will attach upon any property, real or personal, which at any time in his life comes to his ownership. The working out of such a charge would involve such difficulties that it would be hard to show that it is not repugnant to the very idea of ownership, incompatible with the necessities of practical life, and contrary to public policy. But there is another form of charge which has been recognised to some extent, and which is supported by some authority, namely, a general charge upon the property, real or personal, or real and personal, of which a man may be possessed at the date of his death; and such a charge may be expressed to attach upon his property at the moment of his death. Almost equal difficulties suggest themselves, which the establishment of such a charge would entail. Difficult cases have already arisen, such as *Cleary* v. *Fitz Gerald* (1), and whenever such a charge comes to be discussed, I hold myself free to discuss its validity, on the grounds of public policy, of the principles of the law of Bankruptcy, and on other grounds, and to review the authorities, chiefly Irish, which lend some support to the contention that a hovering charge of that general character can be created. At present I do not think that there is any authority binding on us, recognising such a charge, unless it is limited to landed property, or to some defined sort or class or piece of personal property,

(1) 7 L. R. Ir. 229.

e.g. the case of the book debts: *Tailby* v. *The Official Receiver* (1). Though Serjeant Jellett tried not to peril his case here on an absolute charge upon all Sir James Spaight's property, I think the terms of the contract drove him to that. The document described the property out of which payment was to be made as "the first and readiest of his means, estate, and effects." These are not definite words, and if they create a charge at all, it must extend to all the property of Sir James Spaight. I think the very vagueness of the subject-matter goes to show that no specific charge was created. But what was the obligation?—"*to make payment* to Elizabeth Alason Eckford" of the annuity as a debt, and in my opinion the reference to the "first and readiest means" of payment, was not for the purpose of charging all or any class of the obligor's property, but only of indicating that the debt was to be paid out of the first available fund. The promise "out of the first and readiest of his means, estate, and effects to make payment," creates a personal obligation to pay "ready money down," as soon as available, but it does not make a specific charge upon ready money or any other property. The words are analogous to the common form of order in Receiver matters, that the Receiver shall pay out of the first money that comes to his hands. Analogous expressions may be found in statutes directing payments by County Treasurers, out of the first moneys that come to their hands, payments out of the growing produce of the Consolidated Fund, and the like. They amount only to directions as to the payment, and do not alter its character.

The contract in several other places uses the words "to make payment," where no fund is mentioned, and a debt only is created. On the other hand, there are places where a charge is created by apt words, *e.g.* with regard to Francis Spaight's property at Tarbert, showing that where a charge was intended the proper words are used. Furthermore, the provision that a competent part of the assets of James Spaight should be set apart to meet the annuity, before the children drew any part, indicates that there was no general charge on the whole property. I think it is clear that this contract created the relation of debtor and

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(1) 13 App. Cas. 523.

Appeal.
1895.
Bannatyne v. Ferguson.
Fitz Gibbon, L.J.

creditor, and that alone, with respect to the annuity, and that the Vice-Chancellor's first declaration is therefore right.

On the other question, whether the execution by Sir James Spaight, thirty-nine years after his marriage contract, of the deed of 1889, exercising his newly-acquired power to charge what was not his property at all with a jointure for his wife, was a performance of his covenant, and a payment of his debt under the deed of 1850, I am wholly unable to agree with the declaration in the order appealed from. I am confident that no such idea ever entered his head, and that it is directly contrary to his real intention. In my opinion there is no presumption of performance in such a case, and the evidence, so far as there is any to be found in the documents, is entirely the other way. The Lord Chancellor has pointed out that the essential element is wanting—the annuity which Lady Spaight takes under the deed of 1889 does not come out of the same pocket which was bound to pay her annuity under the deed of 1850. Sir James Spaight had no interest in the property out of which the jointure issues. He had an estate for his own life only, and the jointure first attached when the property passed over by his death to his brother George Spaight.

But, furthermore, if one thing is to be a performance or a satisfaction of another, the least we may expect is that it shall be equal to that for which it is done or given. Mark the differences between the annuity and the jointure. Much weight was thrown by Serjeant Jellett on the difference of amount; under the deed of 1850, the annuity, on falling into arrear, became at once an annuity of £240, and began to bear interest. I would add that the annuities are payable in different ways, and at different times, and the amounts must, in any event, be different. Under the deed of 1850, if Sir James Spaight died the day before any Whitsunday or Martinmas, Lady Spaight at once became entitled to a sum of £100. The annuity did not begin to run until the feast-day, but it was then payable in advance, and therefore on the feast-day she became entitled to a second sum of £100, and there can be no apportionment. The jointure, on the contrary, began to run on the day of her husband's death, and the first payment accrued from day to day, and was subject to apportionment, but was not payable until six months after it began to run. Therefore she might get £200 under one deed, where under the other

Appeal.
1895.

BANNATYNE
v.
FERGUSON.

Fitz Gibbon,
L.J.

she might get nothing personally, and her representatives might get only some small apportionment if she survived her husband only a few days. Moreover, unless her husband and she both died on Whitsunday or Martinmas, the last gale of the jointure must be less than the last payment under the deed of 1850, and the latter would be paid in advance besides. As regards amount and incidents, the things are totally different, and there are, therefore, two fatal defects in the respondent's contention—first, that the supposed performance and satisfaction by Sir James Spaight is out of another man's property, under a voluntary power which was entirely independent of his obligation; and secondly, the supposed performance and satisfaction are less than the obligation. The whole fallacy is really exposed by asking—If Sir James Spaight had died a rich man would his widow have been bound to take £200 a-year, accruing from day to day, but not payable for six months, without penalty for delay, and without interest, in satisfaction of all her demands under her marriage contract? Even in such a plain case, it is pleasant to think that we are doing what the parties themselves intended. I find no authority for the proposition that there is a presumption that a man who voluntarily exercises an after-acquired power of appointment in favour of his wife over another man's property is thereby paying his own debt, or discharging any previous obligation to provide for her out of his own means. I assume that it may be possible so to use a voluntary power of appointment as to relieve the donee or his estate; but I am clear that it must at least appear clearly, in some shape or form, that he intends to do so; and, as at present advised, I think that, to produce the result, it must also be shown that the exercise of the power has been accepted as a satisfaction. In many cases the question of fraud upon the power would arise. But, in this case, what reason can be suggested for imputing the intention to satisfy the annuity by the jointure? We do not know whether Sir James Spaight was solvent in 1889. If he was, why should he take away the small provision which his marriage settlement had made for his wife, because he had become a landed proprietor with power to give her a jointure? The power of jointuring was not given to him with any reference to the deed of 1850, but as the tenant for life of the Derry estate.

Lady Spaight got the jointure, not as the widow of the young business-man of 1850, but as the widow of Sir James Spaight of Derry of 1889. It was only natural that any provision which her husband could make for her out of his own property should be increased by the £200 a-year chargeable on the Derry estate. During the argument, I pointed out the difficulty of imputing performance, if the question had arisen with regard to George Spaight's widow, because only two jointures of £200 each can be charged on the Derry estate at the same time. Could a contingent deferred jointure be a satisfaction? In the alternative case of Sir James Spaight's insolvency, it is even more repugnant to our sense of what is just or natural to suggest that, when he became poor, he tried to save his own assets, and tried to deprive his wife of her dividend upon the debt which he owed her under his marriage contract.

Lastly, I have to observe that, as the income of the policy-money is to stand as a security for the annuity under the settlement only in the event of default by Sir James Spaight in securing that annuity upon real estate, the order of the Vice-Chancellor is inconsistent, for it declares that the annuity has been so secured, and yet that the income of the policy-money still stands as security for it. For these reasons I am unable to uphold the second declaration appealed from.

BARRY, L.J.:—

I shall add a very few words expressing my concurrence, arriving as I do at the same conclusion as the other members of the Court.

There are two questions arising in the case, one the construction and effect of the settlement of 1850, and the other the operation and result of the appointment of the jointure by the deed of 1889. The first question, the construction and effect of the settlement of 1850 involves two branches. The first branch is whether it is legally possible for a man to charge his after-acquired personal property, that is all the property which may come to him by the result of his industry or from other sources. Is it possible for him prophetically to charge that property specifically with a sum of money or an annuity? On that subject the Lord Chancellor and Fitz Gibbon, L.J., have declined to give any opinion; I shall follow that example. The same course has already been adopted in England both in the Court of Appeal and in the House of Lords, and there is great uncertainty as to what is the true rule of law on the subject. In *Coombe* v. *Carter* (1), Bowen, L.J., said, "The time will come when the Court of Appeal will have to consider the law as to assignments of future property, and to lay down, if it can, for the guidance of the profession some more definite rule than is to be gathered from the cases since *Holroyd* v. *Marshall* (2). As it seems to me, language has been used in some of them which tends to confuse the two distinct ideas, of vagueness in the contract, and vagueness which arises from the difficulty of identifying future property. 'Vagueness' is a misleading term. A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect at law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a Court of Equity from enforcing the contract. Even then there may be something in the nature of the contract which will prevent its being enforced. I will not attempt to define what will have that effect. It is suggested that, as distinct from vagueness, there may be such wideness in a contract that it ought not to be enforced by a Court of Equity. Thus it is said a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision."

That is the condition of the authorities as expressed by Bowen, L.J. In this country no doubt there is distinct authority that such a contract will be effectual in a Court of Equity. It was so decided by Sir E. Sullivan, M.R., in *Galavan* v. *Dunne* (3), but in that case Sir E. Sullivan expressly based his decision on the antecedent decisions of *Lyster* v. *Burroughs* (4), *Anderson* v.

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(1) 36 Ch. Div. 348.
(2) 10 H. L. Cas. 191.
(3) 7 L. R. Ir. 144.
(4) 1 Dr. & Wal. 149.

White (1) and *Stack* v. *Royse* (2). He states the obligation he was under by those previous authorities, and abstained from giving any opinion of his own, though there is a clear indication that he was strongly impressed by the language of Bacon, V.-C., in *Ex parte Bolland* (3), to the effect that a man cannot charge his after-acquired property to the detriment of his creditors.

The next point under the deed of 1850 is whether the language of that deed—supposing that the after-acquired property is chargeable—is sufficient to create such a charge? I am of opinion that reading the whole deed it does not amount to a specific charge. It rests in covenant or contract, and the whole deed having been parsed from beginning to end—I do not suggest unnecessarily—I think it has been sufficiently discussed to relieve me from the tedium of going through it again. I think the deed is absolutely positive in indicating that the covenant was not to be a charge, but only a contract. So I do not refer to the cases cited, and that being so, I agree with the Lord Chancellor and Fitz Gibbon, L. J., in an affirmation of the Vice-Chancellor's first proposition that the deed of 1850 does not create a specific charge.

The second question is independent of the first. It is whether the appointment by James Spaight of the jointure of £200 a-year is either altogether, or *pro tanto*, a satisfaction or performance of his covenant. This subject was so fully discussed by the Lord Chancellor and by Fitz Gibbon, L.J., I should only be repeating their judgments if I went over the question again. They have given the reasons for their conclusion in which I concur. I might add a few more reasons by calling attention in detail to other passages that might have important bearing upon that part of the case.

The first difficulty in the way of holding this to be a satisfaction or performance is that it does not emanate from James Spaight, the covenantor in the deed of 1850. He did not directly or indirectly contribute one shilling out of his own money to satisfy the covenant. There are cases possibly in which a man having a power may use it to get rid of a liability of his own, if it can be shown that he intended to do so, but there is no evidence of that here. I am clear that James Spaight had no idea of discharging his obligation in his marriage contract by the use of the power given to him by his father. If he were asked the question, "Do you mean this to interfere with your covenant under the deed of 1850?" he would have answered, "Of course not." As was said by FitzGibbon, L.J., he had other prospects before him in the great trade in which he was engaged in 1850. His trade was a failure, but was he then to make use of the power he had over the property of his brother to grant a provision to his wife and endeavour to save his own property? It is impossible to conceive it.

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(1) 1 Ir. Ch. R. 419. (2) 12 Ir. Ch. R. 246. (3) L. R. 17 Eq. 115.

Coming away from that to a matter of strict construction, there is only one point of similitude between the annuity and the jointure, that they are both for £200 a-year. If the jointure under the will had been £100 or £300, the question would never have been raised. £200 was the amount of the annuity fixed in 1850, and thirty-nine years after, a jointure of £200 a-year is appointed by the deed of 1889. They were totally different save that both were for the widow. The provision of Francis Spaight's will was only to enable Sir James Spaight to give a jointure to his widow of £200 a-year. To support the rule of satisfaction and performance, the argument ought to go on to say that the power of jointuring was given to Sir James Spaight to enable him to discharge the annuity. But that is not the fact; there is not a shadow of foundation for the view that the will providing this jointure of £200 a-year was suggested by the settlement of 1850. There is a life estate in succession to each of three sons, and each had a power to provide a jointure of £200 a-year for his wife. It is only as succeeding to the property that Sir James Spaight had the power, and therefore that his £200 should be taken as not on the same footing as the others is certainly an extravagant surmise. But as the Lord Chancellor has pointed out, to establish satisfaction there must be an intention, to establish performance there must be similitude between the two things. Here the annuity and the jointure are different in several most important elements, the dates from which they were to commence, the penalty attaching to the one if in arrear, and not in the case of the other, the interest on the arrears in the case of one, and not in the other, while the pockets out of which they were to come are different. Under those

Appeal. 1895.

BANNATYNE v. FERGUSON.

circumstances I agree with the Lord Chancellor and Fitz Gibbon, L.J., that the deed of the 1st May, 1889, is not a performance.

WALKER, L. J.:—

It has not been disputed that the contract of 8th August, 1850, though in the Scotch form, is an Irish one, and having regard to the domicil of the husband the case of *Chamberlain* v. *Napier* (1) is an express authority that it should be interpreted by Irish law.

I assume, for the purposes of my judgment, that the charge here contended for would, if created by apt words, be valid in law.

If that question comes to be considered as *res integra*, I think a good deal would depend on whether the form of the charge on all future property attracts the policy of the bankrupt laws or does not. In *Tailby* v. *Official Receiver* (2) a security on all future property, to be derived from a defined source, was held good, but with reference to the question whether a security on all property of every kind, to be thereafter acquired, would be good—a point saved in *Coombe* v. *Carter* (3)—Lord Herschell uses the words already read by the Lord Chancellor declining to decide the point, and so also says Lord Watson at p. 535. I therefore express no opinion as to the soundness of the decision in *Galavan* v. *Dunne* (4), which, on my view of the deed, does not arise.

I do not propose to enter upon an analysis of the contract. It is open to three possible constructions:—(1) a personal obligation merely to pay an annuity; (2) an agreement by a future act to charge it, but so that until the act done, no charge arises, and (3) a personal charge or obligation created by the terms of the covenant. For the reasons already so fully given by my colleagues, and which I shall not occupy public time by repeating, I am of opinion that it does not create any such charge.

The second question, upon which we differ from the Vice-Chancellor, is one of general application, and I desire to say a few words upon it.

Before we consider whether Sir James Spaight performed wholly, or in part, his obligation, let us see what the obligation was. The initiatory obligation is to make payment out of his own means, estate, and effects—putting a penalty on his assets if payment was not punctually made. The same observation applied to the £100 which was to be paid by him to cover the period till the first gale accrued. The same idea runs through the provision by which his estate and effects were to be impounded to answer the annuity before the children's rights accrued. Then comes the father's covenant to secure in effect one-half of the annuity, and then James Spaight covenants to effect a policy for £1,500, in the name of the trustees, the interest of which, if he died before securing on real property the annuity, is to be applied towards payment of the annuity, so far as not secured by the father, "the balance of said annuity to be provided for otherwise by the said James Spaight." James Spaight then bound himself, within one year after the death of his father, "in the event of surviving him, to secure to the said E. A. Eckford, on real property, the payment of said annuity to the full amount thereof, as hereinbefore provided, at least so far not secured by the said Francis Spaight." In the event of such real security being given to the satisfaction of the trustees they were to hold the policy for the children.

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(1) 15 Ch. Div. 614.

(2) 13 App. Cas. 523.

(3) 36 Ch. Div. 348.

(4) 7 L. R. Ir. 144.

I think this contemplated James Spaight charging his own real property, as it did his paying out of his own "first and readiest means, estate and effects," and apart from authority it would seem strange if there was a presumption of intention to discharge the obligation when he put a burden on another man's property, saying nothing as to what his own intentions were. It appears that on the 31st March, 1889, Sir James Spaight became, by the death of his brother William, entitled as tenant for life to the lands of Derry and other lands, settled by the will of his father Francis, who died in 1861, and under the will each tenant for life had power to jointure a wife to the extent of £200 *per annum*, provided that there should not be at any time more than two such jointures payable, and by deed of 1st May, 1889, he executed the power, putting upon the estate the jointure which, of course, could not come into existence until all his own ownership had ceased. The deed is made in consideration of natural love and affection, and contains no reference to his obligation under the marriage settlement.

I think the authorities show that the exercise of such a power furnishes no presumption *per se* of an intention to perform or satisfy the prior obligation.

In *Douglas* v. *Willes* (1) trust funds were settled by a marriage settlement of 1790 for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, and it was provided that if *the husband* should during his life *advance or pay any moneys* for or on account of the advancement or preferment in life of any child of the marriage, or in case any lands or tenements, moneys, goods, or chattels, should descend or come by or from him unto or for the benefit of any such child then such moneys, goods, and chattels and the value of such lands or tenements should be accounted as part or in full of that provided by the settlement unless the husband should by writing declare the contrary. The wife, after the marriage, became entitled to one-sixth of a certain residuary estate. This was not actually reduced into possession by the husband, but, by a settlement of the 31st August, 1815, the husband and wife assigned this fund to trustees, upon trust for the husband for life, remainder to the wife for life, remainder to their children, as they and the survivor should appoint, and under this power they made various appointments to the children. The Vice-Chancellor first held this was not property of the husband within the meaning of the settlement of 1790, on its construction, and he then proceeds, at page 328:—"If the question were whether independently of the clause in the settlement of April, 1790, the appointments made in pursuance of the powers given to Charles and Mary jointly, and to the survivor of them under the settlement of August, 1815, were to be deemed satisfactions of portions given under the settlement of April, 1790, the proper answer would, in my view of the case, be in the negative, upon the ground that the provisions in the two cases were not derived from the same estate."

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(1) 7 Hare, 318.

Appeal.
1895.

Bannatyne
v.
Ferguson.

Walker, L.J.

Roberts v. *Dixall* (1) and other cases are then referred to, and he proceeds:—"I cannot think that in the settlement executed upon the marriage of the father in April, 1790, anything more was intended; certainly nothing more is necessarily expressed than to make provision for advances to come out of his own estate."

The same principle will be found in the case of *Samuel* v. *Ward* (2), where a father settled property on himself for life, remainder to his children, with power to the trustees at his request to make advances to the children, and on the marriage of two of them he made advances to them out of his own moneys. It was held that there was not created by these any satisfaction, *pro tanto*, of the children's portions, that the relations between the two funds negatived the presumption which might otherwise arise, and that express contract should be shown.

The principle of performance is that when a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards a completion of the covenant there will be a presumption that he had done the act with the intention to perform his covenant, but must not that imply that, a personal obligation existing on him, he has dedicated his estate wholly or partially to meet the burden on him? Of course it may in such a case as the present be done by contract. I am not prepared to say at present it could be done by adding to the exercise of the power a condition that it should be taken as performance, but I cannot see how putting a liability on another man's inheritance raises *per se* the presumption of the intention to free himself or his own estate. His real and personal assets remain just the same after he has executed the mere power. The only presumption that can, I think, arise is that he intended to do what the deed says.

This appears to be the reason of *Sir W. Davie's Case* (3), and of *Roberts* v. *Dixall* (1) where in fact the covenantee, or person entitled to the benefit of the covenant, got a provision by the act done.

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(1) 2 Eq. Cas. Abr. 668, pl. 19.

(2) 22 Beav. 347.

(3) 5 Vin. Abr. 292, Pl. 38; see Farwell, p. 396.

The only case cited on the other side was *Thacker* v. *Key* (1). There a father had a power of appointment by will over £5000 among his children. There were five of them, and on the marriage of one he covenanted that he would, in exercise of the power, appoint to her one-fifth of the £5000. He died without having exercised the power, and the object claimed the £1000, and also her *aliquot* share of the residue of the £5000. The Vice-Chancellor was of opinion that the covenant to execute the power was illegal and void, but he said also: —" The testator in this case covenanted to appoint a sum of £1000. By not exercising that power of appointment the £1000 reached the hands of the person in whose favour the appointment was to be made. Upon the principles of those cases, I think this is, in truth, either a substantial performance or a satisfaction of the covenant." There all the dealings were referable to appointments under the power. He did not covenant to give or leave anything out of his own estate, and the argument of Mr. Joshua Williams was:—" Sir J. Key's covenant was in effect this, 'I covenant to use my power in such a way as that £1000 shall become vested in you.'" Both provisions issued out of the power—whether by its execution or non-execution of it.

In my opinion, therefore, the deed of 1889 cannot be regarded to any extent as a performance.

Solicitors for Lady Spaight: *Barrington & Son.*
Solicitors for the executor: *Hayes & Son.*
Solicitors for George Spaight: *Exham & Son.*

R. D. M.

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(1) L. R. 8 Eq. 408.

In the MATTER of the ESTATE of RANDAL THOMAS SLACKE, Owner; continued in the name of JAMES WILKINSON SLACKE, Owner; REV. WILLIAM JAMES SLACKE, Administrator of ANNA DELIA SLACKE, Petitioner. No. 1 (1).

Appeal.
1895.
Oct. 29.
Dec. 20.

Insolvent estate—Owner entitled by descent, but having abstained from taking possession—Receiver appointed by Land Commission on foot of arrears of tithe rentcharge—Costs of abortive proceedings against tenants to recover arrears of rent—Implied undertaking to indemnify.

An incumbrancer upon an insolvent estate, having obtained an order for the appointment of a receiver, two receivers were successively appointed at his instance, neither of whom collected any rents, and both died. Some years afterwards the Land Commission, upon foot of their claim for tithe rentcharge, obtained an order for the appointment of a third receiver. The owner having died, the estate descended on his heir-at-law, who never went into possession, or interfered with the estate. The newly-appointed receiver, by leave of the Court, brought an action against a tenant for rent in the name of the owner, without having obtained his consent. The tenant filed a defence, pleading that he was not the tenant and the Statute of Limitations, and obtained a verdict on the former defence, upon which judgment was entered in his favour. He issued execution for his costs against the owner, who was compelled to pay the amount:—

Held (varying the decision of Madden, J.), that the owner was entitled to be indemnified in the first instance out of the estate, and, failing that, by the person who had used his name without his authority.

The petition for sale was presented in 1876 in the name of Randal Thos. Slacke, as owner. He died in 1883, intestate, and proceedings were continued in the name of his son, James Wilkinson Slacke who succeeded as heir-at-law. Neither of these gentlemen was ever in possession of the property or derived any benefit from it, as the estate was insolvent.

On the 18th July, 1884, John Huston was appointed receiver on the application of the first incumbrancer, Marcus Purcell. He died shortly after, and on the 2nd June, 1885, an order was made appointing John Huston, junior, receiver on the application of the said Marcus Purcell, but nothing was done by him in collection of the rents. In 1887 applications were made by the tenants to purchase their holdings through the Land Commission, but after taking some steps, these proceedings came to an end.

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(1) Before Lord Ashbourne, C., and FitzGibbon, Barry, and Walker, L.JJ.

Frequent applications had been made to the receiver for payment of tithe rentcharge by the Land Commission, but without effect.

John Huston, junior, died in 1888, and after various attendances before the Chief Receiver the solicitor for the Land Commission was, on the 23rd November, 1891, directed to lodge an application on Form A, for the appointment of a new receiver. This form stated the late receiver's name—John Huston.

Parties entitled to notice—Messrs. Cronhelm and Tobias, solicitors having carriage; A. Maffett, solicitor for late receiver.

Suggested Ruling.—Upon the motion of William Alexander, Solicitor for Irish Land Commission, let a new receiver be appointed over this estate in the room of the late receiver, John Huston who is dead, and let the ruling of Judge Boyd of 11th March, 1889, be carried out as to the passing of a final account by the executors of the late receiver.

Ruling.—Mr. Tobias attending, Mr. Maffett for widow of late receiver. Be it so, and let J. R. Baillie be appointed receiver on entering into the usual security: bond for £100.—W. B. (1).

On the 7th December, 1893, an application for directions was made by the receiver's solicitor. This form stated the name of the receiver and his solicitor, Mr. W. J. Shannon, and added in the margin—"It is desirable that Mr. W. J. Shannon, solicitor for the receiver, should be present when this application is considered."

Parties entitled to notice—Messrs. Tobias and Co., and W. J. Shannon.

Application by receiver's solicitor.

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(1) The initials "W. B." and "J. M." are those of Judge Boyd and Monroe, J., Receiver Judges.

Suggested Ruling.—That receiver do proceed by writ of summons in the superior Courts in the name of James Wilkinson Slacke as plaintiff against the following tenants:—

Pat. Duffy,	**Yearly rent, £8**	**3**	**9**	**Amount to be proceeded for,**		**£49**	**2**	**6**
Pat. Creggan,	,,	**6**	**4**	**4**	,,	,,	**37**	**6**	**0**
Luke Kelliher,	,,	**26**	**3**	**4**	,,	,,	**157**	**0**	**0**
Anne M'Cabe,	,,	**11**	**15**	**11**	,,	,,	**70**	**15**	**6**
Catherine and James Creggan,	,,	**9**	**18**	**10**	,,	,,	**59**	**13**	**0**

Ruling.—Mr. Tobias for petitioner. Mr. Shannon attending; let receiver have liberty to act as herein suggested, and to proceed against all the tenants herein set out and such others as he may select, and let receiver report and take further directions in case of defences being filed.—J. M.

Extended Report.—The report annexed to application filed is referred to. Since its date the proceedings against Michael M'Conaghey have been brought to issue; and after a trial at Nisi Prius in Dublin a verdict was found for plaintiff for six years' rent and costs. Acting however on the suggestion of the Judge who tried the case, receiver did not cause execution to issue. The tenant M'Conaghey is, receiver believes, willing to pay his rent, but is afraid to do so as the other tenants have combined to resist payment. Recently the receiver held a rent office, but none of the tenants paid; and receiver believes no sum will ever be recovered unless strong steps are taken against each.

On the 2nd May, 1894, an application for directions was made by the receiver. The same parties were stated to be entitled to notice.

Suggested Ruling.—That receiver do proceed with actions for recovery of rents due by tenants named in ruling of 14th December, 1893.

Ruling.—Be it so.—J. M.

Extended Report.—Receiver caused proceedings to be instituted against tenants as directed by last ruling. Writs were issued and appearances entered. All the tenants have filed defences. Each of the defendants pleads a common case; but to save expense it was proposed to try one case as a test case.

A writ of summons was issued out of the Queen's Bench between

Appeal. 1895. *In re* SLACKE'S ESTATE.

James Wilkinson Slacke, plaintiff, and Patrick Duffy, defendant, claiming £49 2*s.* 6*d.* for arrears of rent. The defendant filed a defence denying that he was tenant, and pleading the Statute of Limitations. At the trial before Gibson, J., a verdict was entered for the defendant who proved that in 1885 he married the daughter of a former tenant, and since his marriage had lived on the farm. On a motion for a new trial the Queen's Bench refused to change the verdict, and the defendant Duffy taxed his costs at £69 11*s.* 10*d.* For this sum execution was issued against James Wilkinson Slacke who knew nothing about the proceeding. He paid the costs and applied to Madden, J., for an order that the Irish Land Commission should repay the amount. Madden, J., made the order (see the case reported [1895] 1 Ir. Rep. 474); and from that order the Land Commission appealed.

Piers F. White, Q.C., *Ronan, Q.C.*, and *Cherry*, for the Land Commission.

O'Shaughnessy Q.C., *Meredith, Q.C.*, and *Hynes*, for James W. Slacke.

Dec. 20.

LORD ASHBOURNE, C. :—

In this case the receiver in the name of the owner took certain proceedings against a tenant called Duffy for rent, and the result was that he was defeated, and the owner had to pay £69 11*s.* 10*d.* for costs of this action. Who is to bear the loss of this £69 11*s.* 10*d.*? Not the owner, as he took no part in the matter; practically he had no interest in the estate; he never meddled with the estate, and left it derelict. He must be indemnified by some one. Who is to bear the expense, if the owner must not be left at a loss? His name was used, and there must be assumed to be an implied undertaking to indemnify him. He left the estate to those more concerned in looking after it. Madden, J., recognised the obvious difficulties that surround the case, and arrived at the conclusion that, the Land Commission having got the receiver appointed on a motion, they were responsible for the situation, and he held them bound to indemnify the owner. If I could see the same facts, and from the same point of view, I should come to the same conclusion. The facts, however, were not fully before Madden, J.

What are they, as we now know them? The petition was filed on the 21st November, 1876. There were two receivers appointed before the present receiver, Mr. Baillie, whose appointment has been so much discussed before us. There were proceedings in 1877, and 1878, with a view to bring about a purchase by the tenants of their holdings, and it appears that the tenants, on the 29th June, 1887, were parties to an order being made that they should become purchasers of their holdings. Their names are set out on a document I have before me. On the 14th November, 1887, a motion was moved on behalf of these tenants, setting out in a schedule the proportion of tithe, &c., to which they were liable, and making a consent a rule of Court. Then an order was made on the 20th February, 1888, that a surveyor should attend on the lands and have the boundaries settled. It appears that the tenants attended upon the lands to assist in carrying out that order, and that as lately as 1888 the tenants took this step. Notwithstanding all that, it appears that those who had charges on the estate, including the Land Commission in respect of tithe rentcharge, were paid nothing all the time. Receivers were appointed, but there was nothing to fructify into money. Under those circumstances Mr. Alexander, who was solicitor for the Land Commission, thought it time to apply to have a new receiver brought into existence, so as to take such steps as his duty required. Mr. Alexander states what he did in the 10th paragraph of his affidavit:—"After various attendances before the Chief Receiver, the solicitor for the Land Commission was on the 23rd November, 1891, directed by him to lodge an application on Form A, for the appointment of a new receiver, which the Chief Receiver stated would be brought under the notice of the parties interested and the solicitor having carriage, and ruled upon." The 11th paragraph states:—"This course was adopted by the solicitor for the Land Commission at the instance of the Chief Receiver, and on the 26th November, 1891, the Land Commission solicitor again attended in the receiver office, and was informed by the Chief Receiver that he intended to bring the matter under the special notice of the receiver Judge, and on the 7th December, 1891, a ruling was accordingly made appointing Mr. J. R. Baillie receiver."

Appeal.
1895.

In re SLACKE'S ESTATE.

Lord Ashbourne, C.

Mr. Tobias in his affidavit in the 4th paragraph practically supports that view. He only says that the order was not all in his handwriting, but that the bulk of it was in print. The title of the matter, the attendances and the name of the intended receiver, were in his handwriting, but the operative part of the order was in a printed form. That is really an admission of what Mr. Alexander swore. The orders which were not before Madden, J., entirely support the view of Mr. Alexander, and on reading them it is obvious that the Land Commission did nothing in that application. They seem to have been proceeding on the suggestion of the Chief Receiver that someone should be appointed, and when that suggestion was made, the solicitor having carriage took it up. The Land Commission took no further steps whatever, assuming that everything would be done according to the course of the Court. We have here before us the rulings that were made subsequently in the matter, and they are of interest as showing the forms adopted. The first of these is dated the 23rd November, 1891. It sets out—"The late receiver's name, John Huston. Parties entitled to notice—Messrs. Cronhelm & Tobias, solicitors having carriage, and A. Maffett, solicitor for the late receiver. Suggested ruling—Upon motion of William Alexander, solicitor for the Irish Land Commission, let a new receiver be appointed over this estate in the room of the late receiver John Huston, who is dead, and let the ruling of Judge Boyd of the 11th March, 1889, be carried out as to the passing of a final account by the executors of the late receiver." The ruling is in the column opposite that—"Be it so, and let J. R. Baillie be appointed receiver on entering into the usual security—bond for £100"—and it is initialled "W. B," that is, by Judge Boyd.

That is the sole and only reference to the intervention of the Land Commission in the business, and it will be found in every other subsequent document the matter was left to the course of the Court, and for the Court officials with the aid of the receiver and his solicitor to look after. The next document is dated the 7th December, 1893, and it states in the margin—"It is desirable that Mr. W. J. Shannon, solicitor for the receiver, should be present when this application is considered," and W. J. Shannon is stated to be the receiver's solicitor, and the application is by the receiver's solicitor for an order "that the receiver do proceed by writ of summons in the Superior Courts in the name of James W. Slacke as plaintiff against the following tenants," and it gives the names of the six tenants. The ruling opposite that is—"Let the receiver have liberty to act as herein suggested, and to proceed against all the tenants herein set out and such others as he may select, and let receiver report and take further directions in case of defences being filed." It is initialled "J. M.," that is, by Judge Monroe. The thing was all along left to the course of the Court; the Land Commission was not represented there at all, and if defences were filed the case was again to be brought before the Court, without notice of any kind to the Land Commission. Then comes an extended report which I need not read, but which stated what had been done, and the result of the action before Mr. Justice O'Brien, which ended in a verdict for the plaintiff, and suggesting that steps should be taken against the other tenants. Then comes the last ruling, which is dated the 2nd May, 1894, and that is again headed with the same parties entitled to notice—Messrs. Cronhelm & Tobias and Wm. J. Shannon. The suggested ruling is—"That receiver do proceed with actions for recovery of rents due by tenants named in the ruling of the 14th December, 1893," and the ruling in the margin is "Be it so," "J. M." Then it states in the extended report that the receiver had caused proceedings to be instituted against the tenants as directed by the last ruling, that all the tenants had filed defences, that each of the defendants pleaded a common case, and the receiver's solicitor with a view to saving expense was entering into an arrangement that one case only should be proceeded with and the parties bound by the result of the case. He however required a ruling directing him to proceed in all cases, but if he succeeded in completing the arrangement with the tenants' solicitor he would only enter one case for trial, but he had served notice of trial in all cases.

Now it is quite obvious that on reading these directions and realising the exact position of the parties, though the owner is entitled to be indemnified, there is still no case that would justify us in saying that the Land Commission should be selected to bear this loss. Therefore the order we shall make is to discharge that part of the order which directed that the Land Commission should

Appeal.
1895.
In re SLACKE'S ESTATE.

repay the owner the costs which he has been obliged to pay, and declare that the owner is entitled to be recouped, in the first instance out of the estate, and failing that, by those who used his name without his authority.

FITZ GIBBON, L. J. :—

The Land Commission, so far as I can see, simply did what was within their right. Having a demand against the estate, and finding the receivership in abeyance, they took the proper steps to have a new receiver appointed. Whether purchase or recovery of rent was to follow, a receiver must have been first appointed, but when appointed, he was bound to act under the direction of the Court, and the Land Commission were justified in assuming that he would act rightly, and be rightly directed. They did no more, and they became no more responsible for the costs of proceedings afterwards carried on under the direction of the Court, without their knowledge, than they would have been if the receiver had committed an illegal distress, or done anything else that was wrong. As a matter of fact, he sued a wrong man as tenant, in the name of the owner. The Land Commission only told the Court that the former receiver was dead, and that they wanted a new receiver to be appointed in his place, to act according to law, and under the direction of the Court, when moved by the proper parties. It is therefore impossible to fix the Land Commission with the liability for the costs of an action taken by others without their concurrence.

As regards the next step, we have taken some trouble to find out how the matter really stands. There is, no doubt, a great deal of business transacted in the Chief Receiver's department, which is not safeguarded by all the formalities of regular litigation. I should be very slow indeed to say that such formalities are necessary in such cases. The expense of managing an estate by a receiver, or under the Court, would be rendered intolerable, if not ruinous, if notices to all parties, and attendances by all parties, were required or permitted, whenever directions as to dealings with tenants were wanted. But it is clear that, under the existing practice, when a receiver wants to proceed by action against tenants, he or his solicitor should lodge a paper showing who are the parties entitled to notice, and what it is proposed to do. The receiver is not bound to give notice to any one, but he is bound to inform the Chief Receiver and the Court who are entitled to notice, so that the notice may be given, if necessary, by the Chief Receiver or by the Judge. In this particular case, the paper upon which the proceeding was started names no one but the solicitor who had the carriage as entitled to notice, and the receiver's solicitor specially suggested that he himself should be personally consulted.

Anyone looking carefully into the matter was bound to see that the person whose name was to be used either consented to its use, or was indemnified, and in any view there was, in my opinion, an implied indemnity by the estate, for whose supposed benefit the proceeding was taken. The owner had given no authority to use his name, and the receiver's solicitor knew that. But this does not free the estate from the implied indemnity, though it leaves those who used the owner's name without his knowledge or consent still liable to him. Accordingly, we must discharge that part of the order which fixes the liability on the Land Commission, and declare that the owner is entitled to be indemnified out of the first moneys received out of the estate, or failing that, by the persons who took the proceedings in his name, without his authority, namely—the receiver and his solicitor.

Barry, L.J. :—

I concur in the order that has been announced by the Lord Chancellor and FitzGibbon, L.J., as the order to be made by us, as fully meeting the justice of the case. For a considerable time I was inclined to sustain the order of Madden, J., but I was led to change my opinion in the course of the argument. I was led to believe that there was such an intervention of the Land Commission with the tenants as to render them liable, and I was under that impression for a time. Though the Land Commission were not parties to the proceedings, yet if they were encouraging or demanding the action to be taken against the tenant, it would be difficult to reject the conclusion of Madden, J., that the Land Commission should pay the indemnity

But on examining what has occurred more carefully, it seems that all that they did was, merely to call attention to the fact that one receiver was dead, and that they wanted another, and then they let the proceeding take its course under the direction of the Court. From beginning to end, as pointed out by the Lord Chancellor, there is not a mention of the name of the Land Commission in the proceedings. They might as well be responsible for an act of trespass. Then comes this question, if the Land Commission is not responsible, who is? One general proposition may be laid down. It is the duty of the solicitor, who wanted to bring the action in the name of the owner, to bring under the notice of the authorities who ought to get notice. It may be, as FitzGibbon, L.J., says, the rough and ready way of doing those things is better than the more formal way on account of the expense that would be involved. Whoever the person was, whose duty it was to see who got notice, the owner was never suggested as a person who ought to be served. So he is plaintiff in an expensive action in which his name was used as plaintiff, for which he is answerable for £69 and so he is free from all blame, and the order I think must be that the owner should be recouped out of the estate, and failing that, by the person who used his name without his authority.

WALKER, L.J., concurred.

Solicitor for the Land Commission: *W. Alexander.*
Solicitor for the owner: *the Owner in person.*

R. D. M.

IN THE MATTER OF THE ESTATE OF RANDAL THOMAS SLACKE, OWNER; CONTINUED IN THE NAME OF JAMES WILKINSON SLACKE, OWNER; REV. WILLIAM JAMES SLACKE, ADMINISTRATOR OF ANNA DELIA SLACKE, PETITIONER. No. 2 (1).

Appeal.
1895.
Oct. 29.
1896.
Jan. 20.

Statute of Limitations—Proceedings for sale in Land Judge's Court—Lapse of time—No rent paid—Proposal by tenants to purchase—Failure of proceedings to purchase.

A petition for sale had been filed in 1876, and the conditional order was made absolute on the 31st January, 1877. In 1879 the lands were put up for sale, but £900 only being bid, the offer was not accepted. On the 24th April, 1884, an order was made on the application of the first incumbrancer for a receiver. On the 18th July, 1884, J. H. was appointed receiver, and on the 8th November, 1884, an order was made on the tenants to pay their rents to the receiver. J. H. died in 1885, and on the 2nd June, 1885, J. H. (junior) was appointed in his stead. He died in 1888, and neither of these receivers had collected any rent.

In 1886 and 1887 negotiations were entered into with the tenants to purchase their holdings through the Land Commission, and they were declared purchasers for purchase-money, amounting in the whole to £582. The boundaries and rights of way were fixed by the tenants *inter se* by agreement, and the headrent and tithe rentcharge were apportioned by consent, but nothing further was done to carry out the sale.

On the 7th December, 1891, the Land Commission, to whom arrears of tithe rentcharge were due, obtained an order, appointing J. R. B. receiver, and on the 20th May, 1892, an order was made on the tenants to pay their rents to the receiver. Actions for rent were brought by order of the receiver Judge against six of the tenants, who all filed defences, pleading that they were not tenants and the Statute of Limitations. One of them, D., obtained a verdict and judgment on the former defence. An application was then made to the Land Judge for an order that the tenants should complete their contracts to purchase.

The tenants declined to forego the plea of the Statute of Limitations:—

Held (reversing the decision of Madden, J.), that the tenants should complete their contracts to purchase.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

THE petition was filed on the 21st November, 1876, by Cronhelm and Tobias, solicitors for Anna Delia Slacke, who was entitled to a jointure of £200 a-year as the second incumbrance on the lands. The first incumbrance was a mortgage for £350 created by indenture of mortgage dated the 1st February, 1866, from William Launcelot Slacke to G. H. Reade. By indenture dated the 19th July, 1883, Marcus Purcell was appointed trustee of the mortgage in pursuance of an order of Porter, M.R., in an action of *Reade* v. *Reade*, and by an order of Porter, M.R., in *Massy* v. *Purcell*, on the 2nd July, 1891, Marcus Purcell was discharged from being trustee of said indenture, and Cecil H. Massy was appointed trustee in his stead. No interest had been paid on the mortgage since the 21st August, 1877, and there was seventeen years' interest due up to the 21st August, 1894.

On the 10th August, 1883, Marcus Purcell paid the sum of £70 11*s.* out of the trust funds in his hands to the head landlord in respect of the arrears of headrent, to save the lands from eviction. The conditional order for sale was made absolute on the 31st January, 1877, and the lands were put up for sale in 1879, when the sum of £900 was bid, but this sum was not accepted.

On the 4th August, 1881, Cronhelm and Tobias obtained an order to continue in the name of William James Slacke, and on the 19th November, 1883, they obtained a further order to continue in the name of James Wilkinson Slacke.

On the 24th April, 1884, an order was made, on the application of Marcus Purcell, for the appointment of a receiver, and on the 18th July, 1884, John Huston was appointed receiver. On the 8th November, 1884, the usual order on the tenants to pay their rents was made. On the 25th January, 1885, John Huston died, without ever having collected any rents. On the 24th March, 1885, an application was made on behalf of Marcus Purcell, to have himself declared purchaser for the amount due on foot of the mortgage and salvage claim and interest, but this application was refused, and it was referred to the receiver Judge to appoint another receiver, and to the examiner to re-settle the rental, and it was ordered that the estate be brought to a re-sale. On the 2nd June, 1885, John Huston, junior was appointed receiver, and on the 22nd August, 1885, he obtained the usual order on the tenants to pay. He died on the 8th December, 1888, without ever having collected any rents, and he never accounted. The rental having been re-settled, the lands were put up for sale by public auction at Mohill, on the 30th April, 1886, when £500 was bid, but the offer was not accepted.

Negotiations were then entered into with the tenants, which resulted in a proposal by them jointly dated the 11th May, 1886, to purchase for £570. There was a further proposal, dated the 4th November, 1886, to purchase for sums in respect of each tenancy, amounting in all to £570; this was increased by a further proposal dated the 29th June, 1887, to £582, and by an order of the Land Judge's Court on that date the proposal was accepted, and the tenants were declared purchasers of their holdings for the sums set opposite their names:—Michael Mitchell, £65 7*s.* 7*d.*; Patrick Duffy, £68 15*s.* 5*d.*; Patrick Cregan, £85 13*s.* 4*d.*; Andrew M'Conachy, £59 4*s.* 11*d.*; F. and L. Kelleher, £219 11*s.* 5*d.*; Mathew Cregan, £83 7*s.* 4*d.*—Total, £582; and it was referred to the examiner to re-settle the rental, and to the Ordnance Survey to colour the map. By a further order dated the 14th November, 1887, a consent dated the 2nd November, 1887, entered into by the tenant purchasers, ascertaining as between themselves their proportion of head rent and tithe rentcharge, was made a rule of Court on the application of their solicitor. The tenant purchasers also entered into an agreement in writing between themselves dated the 8th June, 1887, for the purpose of adjusting the rights of way.

On the 25th February, 1888, the tenants' solicitor obtained a direction from the examiner that a surveyor should attend again upon the lands to revise the survey in reference to any change of boundaries and to report upon the rights of way to be preserved with a view to conveying the tenants' holdings separately. The Ordnance report was made on the 20th March, 1888, and showed that on the 9th and 10th March, 1888, the tenants' solicitor with the surveyor attended on the lands; the tenants also attended, and pointed out the boundaries of their holdings.

No further proceedings were taken in the matter for the purpose of completing the sale, and the tenants never lodged their purchase-money, or paid interest on it.

Appeal.
1895.

In re
SLACKE'S
ESTATE.

On the 22nd July, 1891, an appearance was entered for Cecil H. Massy, notice of which was served on the owner, and on the solicitor having carriage, but neither Massy nor his solicitors received any notice of the subsequent proceedings.

On the 7th December, 1891, W. Alexander, solicitor to the Irish Land Commission, to whom a large amount was due for tithe rentcharge, applied for the appointment of a receiver in the room of John Huston, junior, and J. R. Baillie was appointed, and it was ordered that the solicitor for the petitioner, the solicitor for Marcus Purcell, and the owner, should have notice of all further proceedings in the receiver matter (1). On the 20th May, 1892, the usual order on the tenants to pay was made. On the 8th November, 1892, the receiver proceeded by writ in the Exchequer Division against one of the tenants, Andrew M'Conachy for six years' rent. The defendant denied the tenancy and pleaded the Statute of Limitations. The case was tried before O'Brien, J., and a common jury in Trinity Sittings, 1893, when the Judge directed a verdict and entered judgment for the plaintiff for £42 8*s.* 6*d.*, being six years' rent. On the 7th December, 1893, the receiver obtained a ruling from the receiver Judge giving him liberty to proceed by writ of summons in the Superior Courts in the name of Jas. Wilkinson Slacke against Duffy, P. Cregan, Kelliher, Anne M'Cabe, and Catherine and James Cregan, and to report and take further directions in case of defences filed. In pursuance of this ruling an action was brought against Duffy on the 17th January, 1894, and the same defences as in M'Conachy's case were pleaded. The case was tried before Gibson, J., in Trinity Sittings 1894, and resulted in a verdict for the defendant, who proved that he married the daughter of the old tenant, and went to reside on the farm, and worked it from the date of his marriage in 1885. On the motion to the Queen's Bench to change the verdict and enter judgment for the plaintiff, the Court on the 24th November, 1894, held that the verdict should stand.

On the 19th December, 1894, an order was made transferring the carriage of the proceedings in the Land Judge's Court to Cecil H. Massy, who on the 5th June, 1895, applied to Madden, J., sitting for the Land Judge, for an order that the tenants should within fourteen days lodge the sums set opposite their names, being the purchase-money of £582 mentioned in the order of the 29th June, 1887, and should proceed to carry out their purchase, and in default of such lodgment that they should deliver up possession of the land to the receiver. Affidavits had been filed by Patrick Cregan and Patrick Duffy, stating that the proposals to purchase their holdings by the tenants in 1886 and 1887 had been made on the basis that the Land Commission would sanction an advance under the Land Purchase Acts, but no such advance had been sanctioned, and they had no means to carry out the purchase themselves, and that the agreement to purchase was long since at an end.

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(1) See *Slacke's Estate* (No. 1), *ante*, p. 181.

On the 19th June, 1895, Madden, J., refused the application, and from that order C. H. Massy appealed.

Matheson, Q.C., and *Jefferson*, for the appellant:—

The appointment of Baillie as receiver, and the order on the tenants to pay, could not put an end to the agreements to purchase. It was the Land Commission who procured his appointment, without notice to us, and they were ignorant of the prior proceedings. It is a matter of course in the Land Judge's Court to appoint a new receiver if a receiver dies; till the conveyance is executed, a receiver is never discharged. These proceedings by the receiver in no way took away our rights, or the rights of the incumbrancers under the order of 1887. The confusion arises from the jurisdiction of the Land Judge's Court and the Court of the receiver Judge being vested in one and the same person; they are two distinct Courts, exercising two different jurisdictions. The incumbrancers get notice of the proceedings in the Land Judge's Court; they do not in the Court of the receiver Judge. The order of the 20th May, 1892, cannot therefore put an end to the proposal to purchase. If the tenants are let out of the orders made in 1887 and 1888, it ought to be upon terms, and the terms would be payment of the arrears of rent.

Matthew J. Bourke, Q.C., and *Healy*, for the tenants, other than Patrick Duffy:—

Appeal.
1895.
In re SLACKE'S ESTATE.

In 1887 we were equitable owners. We ceased to be in that position by the order of the 20th May, 1892, while we ceased to occupy the position of tenants on the lapse of twelve years from the last payment of rent. The purchaser in possession under a contract of purchase, which is subsequently rescinded, is not liable for rent: *Howard* v. *Shaw* (1); *Markey* v. *Coote* (2). It makes no difference that the tenant has been in possession before as tenant: *Daniels* v. *Davison* (3). Slight circumstances are enough to prove abandonment: *Knatchbull* v. *Grueber* (4).

Staunton, for Patrick Duffy.

Matheson, *Q.C.*, in reply :—

The question is, What is the *status* of the tenants? They say there was a contract to purchase in existence until May, 1892, but that the order of the 20th May, 1892, changed their position, and that they are entitled to be put back to the *status quo ante*. But further, they claim to be restored to their former *status*, with the additional advantage that these five years are to be counted into the period of the Statute of Limitations.

On the 20th December, 1895, the case appeared in the list to be mentioned, when the Lord Chancellor stated that the Court had come to the conclusion that it was reasonable, under the circumstances of this case, to give the tenants an option as to the course they should adopt. The option was: The tenants not to plead the Statute of Limitations in any action of ejectment or for rent, save so far as to the amount of rent recoverable, but without prejudice to any other defence that any person sued might use, or failing this that the tenants be declared bound by their contracts to purchase; and the Court adjourned the case until Hilary Sittings for the purpose of affording time to consider the proposal.

On the 16th January, 1896, one of the tenants, Duffy, gave an undertaking not to plead the Statute of Limitations, but the other tenants by their counsel refused, and the case stood for judgment till the 20th January.

(1) 8 M. & W. 118.
(2) Ir. R. 10 C. L. 149.
(3) 16 Ves. 249.
(4) 3 Mer. 124.

Appeal.
1896.

In re Slacke's Estate.

Jan. 20.

Lord Ashbourne, C. :—

This is a case to which we have given careful consideration and attention, with the result that after a long hearing, we arrived at the conclusion that we thought it reasonable under the circumstances to give the option, which we announced during the sittings before Christmas. It appears that in 1886 and 1887, the tenants entered into contracts to purchase their holdings, under the Land Purchase Acts, and the requisite preliminary steps were taken by them, such as assisting to settle their boundaries, to carry out their contract. It does not appear that the tenants took any steps after, I think, 1887, to carry out the transaction, and it does not appear that any active steps were taken by anyone to stir them into activity or to enforce the contracts. There were several receivers appointed, and various steps taken against the tenants, as tenants, to make them pay rent, and those steps not being very successful ultimately a motion was moved before the Land Judge to make them complete their contracts of purchase. The tenants defended themselves by saying that by the order made on them to pay their rents to the receiver, and the subsequent proceedings taken against them by the receiver, the agreements to purchase had been ignored and abandoned and were then at an end, and that under those circumstances it was not reasonable to treat them first as purchasers, then as tenants, and then again to seek to treat them as purchasers. Under those circumstances, and having given the matter much consideration, we considered it reasonable to give the tenants an option, and as it was right that the parties concerned should have time to consider their position, we gave them the vacation time for that purpose. The option was this—"The tenants not to plead the Statute of Limitations in any action or ejectment for rent, save so far as to the amount of rent recoverable, but without prejudice to any other defence that any person sued might use, or failing this that the tenants be declared bound by their contract to purchase." The tenants after having had weeks to consider, have decided on their answer; one of the tenants, Duffy, will give the undertaking, and the other tenants represented by Mr. Bourke and Mr. Healy, stated that they would not. Under these circumstances we have decided to make the following order (after the formal introductory part)—"Whereupon the respondent Patrick Duffy by his counsel in open Court, giving the following undertaking, viz. not to plead the Statute of Limitations in any action or ejectment for rent that may be brought against him to recover the rent of the premises in his occupation, save as to the amount of rent recoverable, without prejudice, however, to any other defence which he may be advised to plead in such action or ejectment, It is ordered that as regards the said Patrick Duffy this appeal motion be dismissed without costs; but the other respondents Michael Mitchell, Patrick Cregan, Andrew M'Conchy, Felix Kelleher and Luke Kelleher, and Mathew Cregan, declining by their counsel in open Court to give such undertaking, or to acknowledge any tenancy in the lands, It is ordered that as regards said respondents the order appealed from do stand discharged without costs, and It is declared that the said respondents Michael Mitchell, Patrick Cregan, Andrew M'Conchy, Felix Kelleher, and Luke Kelleher, and Mathew Cregan respectively are bound by their contract of purchase contained in their proposals of 4th November, 1886, and 29th June, 1887, as regards the portions of the lands purchased by them, and are bound to carry out the same according to the course of the Land Judge's Court, and it is hereby referred to the Land Judge's Court to carry into effect the foregoing declaration."

FITZ GIBBON, L.J. :—

I entirely concur. In 1885 and 1886, when the agreements were made for the purchase of the holdings, the *status* of the tenants, as such, was the basis of the dealings with them. Furthermore, the management of the landlord's estate was then, and has ever since been, in the hands of the Court through a receiver, and was therefore *in custodia legis*. At that time a number of parties, claiming to be and treated as tenants, contracted to purchase their holdings. Some of them—Duffy for example—may not have been able to deduce strict title as tenants, but all were in occupation, and were in the same position as many occupiers who, owing to marriages, deaths, the omission to take out legal representation, and other like circumstances, cannot legally deduce title to the tenancy in the land they occupy. For years after these contracts, by a series of accidents, and a course of neglect far from creditable to the parties concerned, nothing was done by those who had the carriage of the proceedings, or by the tenants, to complete the purchases. When, at last, further proceedings were taken, the occupiers were treated, not as purchasers, but as if they were still tenants. According to ordinary principles, once the contracts were signed, they could be got rid of only by rescission, or by its equivalent, namely, a breach of the contract by one party, and an acceptance of that breach by the other. When the purchasers were sued as tenants, they defeated the proceeding, and among other grounds, length of time was relied upon, though time covered by the *status* of contractual purchasers is immaterial to the Statute of Limitations, especially where the subject-matter of the contract is in charge of the Court, although it has been neglected by everybody concerned. Now, when the Court tries to enforce the contract to purchase, the same parties turn round and say, "No. You have put an end to the contract by treating us as still tenants." We give them their choice, but we do not allow them to "blow hot and cold." If they repudiate the position of tenants, they must not rely on having been treated as such, unless they accept the position of purchasers. If they accept the position of tenants, their right to rely on the Statute of Limitations must be limited to the amount of the arrears of rent which may be recovered. But we must not allow them to escape both responsibilities by using each of them in turn to defeat the other.

It may not perhaps be altogether out of place to observe that our orders on the appeal of the Land Commission, and on this appeal, will have the effect of giving several parties a direct personal interest in trying to realize something out of the property. The Land Commission has put the Court in motion to recover tithe rentcharge, the receiver and his solicitor have to indemnify themselves against costs, and the party having the carriage has also costs to recover. The Court, too, has had its attention directed to the case, and is

Appeal. 1896. *In re* SLACKE'S ESTATE.

bound to require the parties concerned either to go on with the proceedings with reasonable diligence, or to abandon them altogether.

BARRY, L.J., and WALKER, L.J., concurred.

Solicitors having carriage: *T. W. Hardman & Sons.*
Solicitors for the tenants: *T. W. Delany.*

R. D. M.

Probate. 1895. June 17.

IN THE GOODS OF JOHN VEREKER, DECEASED.

Practice—Limited administration—Grant for the purpose of vesting trust term in new trustees.

Where, upon the occasion of the appointment of new trustees of a settlement, which comprised, amongst other trust funds, a charge on the settled lands which had been paid off by the former trustees, and an assignment of it taken from the persons beneficially interested therein, the new trustees required that a term of years created for the purpose of securing the charge, which had not been assigned to the former trustees, should be transferred to them, and there was no personal representative of the surviving trustee of the term living, the Court, on the application of the attorney of the person beneficially entitled to the charge who was resident abroad, gave liberty to his attorney to apply for a grant limited to assigning the term to the new trustees. Form of order.

MOTION.

This was an application on behalf of Charles Edward Lloyd, of Melbourne, Victoria, for a grant of administration of the estate and effects of John Vereker, deceased, remaining unadministered to Robert Courtenay Vance, as attorney of the said Charles Edward Lloyd, limited to the interest of the said John Vereker in a term of 500 years, vested in Ralph Westropp and the said John Vereker by a settlement of 17th June, 1808.

The facts of the case stated in the affidavit of the said Robert Courtenay Vance were as follows:—

John Vereker, late of the city of Limerick, Alderman, died on the 23rd May, 1837, having previously made his will dated the 2nd July, 1832, but named no person as executor or executrix thereof. On the 24th August, 1837, letters of administration with the said will annexed were granted to Eliza Vereker, the widow of the deceased, and the principal legatee in the said will named. The deceased left him surviving several children. The said John Vereker and Ralph Westropp of the city of Limerick were trustees of a term of 500 years in certain lands in the county of Tipperary created by a settlement made on the occasion of the marriage of John Lloyd and Catherine Rotton, dated the 17th June, 1808. The trusts of the said term were in the events which happened, namely, of there being two younger children of the said marriage to raise the sum of £4000, Irish, to be divided between them as the said John Lloyd should appoint, or in default of appointment in equal shares.

The said lands were resettled on the occasion of the marriage of Charles Henry Lloyd the eldest son of the said John Lloyd and Catherine Lloyd, and power was given to the trustees of his settlement dated 11th August, 1846, out of certain funds put in settlement to pay off and take an assignment of the said charge of £4000 Irish. The said John Lloyd appointed the said charge as follows, namely, £3000 (present currency) to his daughter Catherine Lloyd, and the balance £692 present currency to his son Frederick Lloyd. The said charges of £3000 and £692 were subsequently assigned to the trustees of the settlement of 11th August, 1846, by the persons beneficially entitled to the same, but the said term of years vested in the said John Vereker and Ralph Westropp was never assigned to the said trustees. By reason of certain dealings with the trust funds of the settlement of 11th August, 1846, it became necessary to have new trustees of the said settlement appointed, and the persons who consented to act as new trustees required that the said term of years vested in the said John Vereker and Ralph Westropp should be assigned to them.

The said Ralph Westropp predeceased the said John Vereker; the said Eliza Vereker died 14th June, 1856, without assigning the said term, and there was no personal representative of the

Probate. 1895. *In re* VEREKER.

said John Vereker to assign the same. Charles Edward Lloyd of Melbourne, Victoria, the eldest son of the said Charles Henry Lloyd, was under the trusts of the settlement of 11th August, 1846, entitled to the said charge of £4000, subject to the right of the trustees of his half-sister, Anne Catherine Headech, and of Louisa Jane Lloyd, widow of the said Charles Henry Lloyd, to have the said charge made available to secure a sum of £7000 to the trustees of the said Anne Catherine Headech, and to secure a jointure of £200 to the said Louisa Jane Lloyd. The said Robert Courtenay Vance held jointly with Robert Arthur Singleton Collett a power of attorney from the said Charles Edward Lloyd.

William Lawson, in support of the motion (1).

THE COURT made the following order:—

"IT is ordered by the Court that the said Robert Courtenay Vance, as the attorney lawfully appointed of Charles Edward Lloyd, be at liberty to apply for and to obtain letters of administration *de bonis non* of the said John Vereker, deceased, limited to assign to the new trustees, when appointed, of the settlement of the 11th August, 1846, in the affidavit of the said Robert Courtenay Vance referred to, all the residue unexpired in the term of 500 years by a settlement of the 17th June, 1808, limited to John Vereker, the deceased herein, and Ralph Westropp, the trustees therein named, and of whom the said John Vereker was the survivor, upon satisfying the Judge's Registrar of the due appointment of new trustees of the said settlement of 11th August, 1846, and of the vesting in them of the sum of £4000 secured by the said term."

Solicitor: *R. C. Vance.*

W. L.

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(1) See Coote and Tristram (1891), p. 159; Miller's Probate, p. 396, and cases there cited [Rep.].

In the GOODS of MICHAEL MAGRATH, Deceased.

Probate.
1895.
Nov. 4.

Practice—Grant to guardian on behalf of one minor—Other minors interested—Citation of married women abroad dispensed with.

A bachelor died intestate and insolvent, his only assets being £48 cash and £11 arrears of rent, leaving his only next-of-kin the children of three deceased sisters; the children of one sister were minors and wards of Court: the children of another sister were minors, but not wards of Court; the children of the third sister were married and living abroad.

The Court made a grant to the guardian of the eldest minor, who was a ward of Court, without requiring the married children to be cited.

Motion.

Application by James O'Geran for a grant of administration of the estate and effects of the deceased, for the use of Maurice Joseph Judge, a minor.

The facts of the case were stated in the motion-paper, and were as follows:—Michael Magrath, the deceased, died on the 12th November, 1894, at Queenstown, in the county of Cork. He had no fixed residence. He died a bachelor, without parent, brother, sister, grandparent, uncle or aunt, or great grandparent him surviving. His only next-of-kin were the children of his three sisters, Bridget Judge, Kate Maloney, and Margaret Anderson, the said three sisters having predeceased him. Bridget Judge's only children were Maurice Joseph Judge, born the 22nd April, 1880, and Thomas Cornelius Judge, born the 5th December, 1884. Both children were wards of Court in the matter of Judge minors. Kate Maloney's only children were Maurice Francis Maloney, aged sixteen years, and Helena Mary Maloney, aged twelve years, who lived with their stepmother, at 90, Lower Mount-street, Dublin. They were not wards of Court. The third sister, Margaret Anderson, died abroad; her only children were Emily Josephine Tighe, who lived at 56, Double Third-street, Brooklyn, New York, Annie Agnes Haughton, who lived at 31, Elphiston Circle, Bombay, India, and Mary Lilly Blackburn, who lived at 344, West Eleventh-street, New York.

Probate.
1895.
In re MAGRATH.

Michael Magrath was a man of eccentric habits, and used to wander about. In consequence of this eccentricity he, for several years prior to his death, refused to pay a lay-tithe which was due out of the lands of Upper Lavelly in the county of Cork, of which he was tenant for life, to Mr. Longfield, and the result was that some time before his death Mr. Longfield's solicitors, Messrs. O'Connor and Dudley, instituted proceedings in the Chancery Division, and had a receiver appointed over the said lands of Upper Lavelly, to collect the rents and discharge thereout the arrears of tithe rentcharge then due to Mr. Longfield, together with the costs of the Chancery suit. The order of the Vice-Chancellor, appointing the receiver, was dated the 26th June, 1894, and under it Mr. W. W. Purcell, of Mallow, entered into receipt of the rents as receiver. The intestate died on the 12th November, 1894, and at the time of his death he had no property of any kind whatever, with the exception of £48 7*s.* cash, which was on his person at the time of his death, and a sum of £10 10*s.* 11*d.*, arrears of rent due by tenants of the said lands. On the death of the intestate the police took possession of the said sum of £48 7*s.*, and it was in the hands of District Inspector Byrne of the Royal Irish Constabulary, Queenstown, who was prepared to pay it over to the administrator on administration being granted.

The amount due for arrears of tithes and costs awarded against the said intestate, during his lifetime, in the said Chancery suit, which is entitled *Longfield* v. *Magrath*, would more than absorb the full amount of the assets of the intestate, irrespective of his funeral expenses and costs of administration, and there would therefore be nothing remaining for distribution amongst the next-of-kin.

Michael Magrath was tenant for life of the said lands of Upper Lavelly, under an indenture of family settlement, dated the 14th October, 1873, and under the terms of that deed, in the events which happened, the said Maurice Joseph Judge, a minor, and the said Maurice Francis Maloney, a minor, were each entitled to an undivided moiety of the said lands of Upper Lavelly, which was then in the hands of the receiver. With a view to making the assets of the deceased available for payment of his debts as aforesaid, the Lord Chancellor by an order of the 5th July, 1895, made in the matter of Judge minors, gave the applicant James O'Geran, the guardian of the minors leave to apply to the Probate Division for a grant of administration for the use of the eldest minor, Maurice Joseph Judge.

When the papers were sworn and lodged, in connexion with the grant applied for, the Registrar raised two points:—(1) that as four minors were interested as next-of-kin, viz. two Maloney minors and two Judge minors, the grant should be made for the use of all, and not for the use of one minor only; and (2) that as the three daughters of Mrs. Anderson appeared to be of age they had a prior right to a grant, being adults in an equal degree, and they should be cleared off by renunciation or citation. This would involve considerable expense, and having regard to the fact that the assets were so small, that the estate was insolvent, and that no one had really any interest in the matter except the eld Judge a minor and the eldest Maloney a minor, it was submitte that an order should be made, giving Mr. O'Geran leave to take out a grant without citing the children of Mrs. Anderson, or including in the grant the younger Judge a minor, or the Maloney minors. If the Court required it the four minors would be joined in the application, but as the papers were sworn on behalf of one only, it was suggested that all four ought not to be required to join.

D. M'Carthy Mahony in support of the application (1).

THE PRESIDENT:—

I have read the papers in this case, and am of opinion that the application should be granted.

Solicitors for the applicant: *O'Keefe and Lynch.* W. L.

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(1) See *Sayer* v. *Sayer* (3 Hag. 557, note to *Conyers* v. *Kitson*); *West and Smith* v. *Wilby* (3 Phill. 380); *Webb* v. *Needham* (1 Add. 494); Miller's Probate, p. 349; Coote and Tristram (1891), pp. 135, 136.—[REP.]

M. R.
1894.
Feb. 23.
May 3, 4, 5.
June 20.
Appeal.
1895.
Jan. 29–31.
Feb. 1, 4, 5.
June 29.

LEAHY *v.* DE MOLEYNS.

(1891. No. 12,729.)

Following assets—Claim by mortgagee against devisees and residuary legatees—Statute of Limitations—Trustee Act, 1888 (51 *&* 52 *Vict. c.* 59, *s.* 8)—*Acquiescence—Lapse of time.*

A testator in the year 1855 mortgaged certain freehold lands of which he was absolute owner, and also his life estate in other freehold lands, to secure repayment of a sum of £3109, advanced by the mortgagees, who were trustees of a marriage settlement, with interest at the rate of five per cent. per annum.

The testator died in 1862, having by his will devised the mortgaged lands to his son A for life, with remainder to his first and other sons in tail male; and other freehold lands to his son B in like manner, and bequeathed his residuary personal estate to his executors upon trust for his daughters.

The mortgagees were aware of the death of the testator, but did not require payment of the mortgage debt. The executors paid the debts of the testator (other than the mortgage debt) and converted into money and set apart the residuary personal estate for the benefit of the residuary legatees. Part was afterwards paid over to them, and the remainder was invested by the executors, and the income paid to the residuary legatees. Two of the daughters married, and their shares of the residue were put in settlement. Interest on the mortgage was paid by the devisee of the mortgaged lands down to 1886, when it fell into arrear, and a receiver was appointed. In 1890 an order for sale of the lands was made on the petition of the mortgagees, which proceedings were pending in 1891 when the mortgagees, believing that the lands when sold would not realise sufficient to satisfy their claim for principal and interest, brought an action to administer the real and personal estate of the deceased mortgagor and claimed the right to follow the assets remaining in the hands of the surviving executor as trustee for the residuary legatees, or which had been paid over by him to them. No interest had been paid to the mortgagees since the death of the testator except by the devisee of the mortgaged lands.

The defendants pleaded (1) the Statute of Limitations; (2) The Trustee Act, 1888, s. 8; and (3) laches and acquiescence:—

Held, by the Court of Appeal (affirming the decision of the Master of the Rolls); (1) that the payment of interest by the devisee of the mortgaged lands kept alive the right of the plaintiffs to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the lands

M. R.
1894.

LEAHY
v.
DE MOLEYNS.

being insufficient, and that therefore the Statute of Limitations did not apply; (2) that the residuary legatees were not persons "claiming through a trustee" within the meaning of the Trustee Act, 1888, sect. 8;

Held (3), by the Court of Appeal (reversing on this point the decision of the Master of the Rolls) that there were no special circumstances or action or conduct on the part of the plaintiffs to disentitle them to follow the assets, and that they were entitled to the relief sought.

Ridgway v. *Newstead* (3 D. F. J. 474), and *Blake* v. *Gale* (32 Ch. D. 571), distinguished.

TRIAL OF ACTION.

This action was brought to administer the real and personal estate of Richard Chute. The plaintiffs sued as creditors of the deceased under a mortgage dated December 15, 1855, of certain lands in the county of Kerry vested in them as trustees, by which the testator covenanted to pay a sum of £3109 with interest thereon at the rate of 5 per cent. per annum. Richard Chute died in the year 1862, and interest on the mortgage was paid by his son T. A. Chute the devisee under his will of the mortgaged lands down to the year 1886. A receiver was appointed over the lands in 1888, and in 1890 a petition was presented by the plaintiffs to the Land Judge of the Chancery Division for the sale of the lands, and an order for sale made, but no sale had taken place at the time of action brought. The plaintiffs, believing that the proceeds of the lands when sold would be insufficient to pay the principal and interest due to them, brought this action against Edward De Moleyns, the surviving executor of, and devisee in trust under, the will of Richard Chute, and F. B. Chute, R. Chute, and T. A. Chute, devisees under the said will. After the action came on for hearing the proceedings were amended by adding as defendants the persons entitled to the testator's residuary personal estate, namely, his unmarried daughters, Dora Chute, and Emily Chute, and E. J. Saunderson, and F. B. Chute, the trustees of the settlement on the marriage of his daughter Marion Chute with Milhelm Shakoor, and J. H. Dudgeon, and T. C. Oliver, the trustees of the settlement on the marriage of his daughter Rose Chute with Henry Dudgeon; and the plaintiffs asked for a declaration that the residuary personal assets of the testator which at the commencement of the action remained in the possession of the said

M. R. 1894. [LEAHY *v.* DE MOLEYNS.

Edward De Moleyns as surviving executor, or which had previously thereto been transferred or paid over to the residuary legatees or any trustees for them, were liable to discharge the plaintiffs' claim as specialty creditors of the testator.

It was contended on behalf of the defendants that the plaintiffs' claim was barred, 1, by the Statute of Limitations, on the ground that payment of interest by the owner of the mortgaged estate did not keep alive their right as against the personal estate or the other real estate of the testator; 2, by the Trustee Act, 1888, section 8, which entitled the defendant De Moleyns as trustee, and the added defendants as persons "claiming through him" to the benefit of the Statute of Limitations; and 3, by laches and acquiescence after the lapse of so many years. The facts of the case and the arguments of counsel appear from the judgments.

P. F. White, Q. C., Matheson, Q. C., and *Jefferson,* for the plaintiffs.

T. P. Law, Q. C., Kenny, Q. C., and *J. Herbert Shaw,* for the defendant De Moleyns.

The Right Hon. John Atkinson, Q.C., and *Morphy,* for the defendants, F. B. Chute, and R. Chute.

Daniel Mahony, for the defendant, T. A. Chute.

Price, Q.C., and *C. W. R. Brady,* for the other defendants.

June 20.

THE MASTER OF THE ROLLS (having stated the facts of the case which will be found recapitulated in the judgment of the Lord Chancellor, post p. 224), proceeded as follows:—

The first question is, as to the Statute of Limitations; is it a bar to the plaintiffs' claim?

There was no payment out of Richard Chute's personal estate, or from any other source than the mortgaged lands since his death in 1862.

But does this bar the claim to follow assets when the mortgaged premises are insufficient? In my opinion it does not. The statute is, 37 & 38 Vict. c. 57, s. 8, which is substituted for 3 & 4 Wm. 4, c. 27, s. 40. It provides that "no proceeding shall be brought to recover any money secured by mortgage but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such proceeding shall be brought, but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

There is no doubt that payment by a mere stranger will not suffice—*Homan* v. *Andrews* (1). But payment by the person liable will, and payment by a tenant for life will, as a rule, bind the remainderman—*Roddam* v. *Morley* (2). *Roddam* v. *Morley* (2) was, no doubt, criticised in *Coope* v. *Cresswell* (3). But in *Pears* v. *Laing* (4), *Roddam* v. *Morley* (2), is referred to by Bacon, V.-C., as follows:—"The case of *Roddam* v. *Morley* (2), which, notwithstanding all that has been said of it in *Coope* v. *Cresswell* (3), or elsewhere, I conceive to be of unquestionable authority, has decided that payment of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder. But the case is also of great value, by reason of the close and careful examination into the Statutes of Limitation, as well by the Common Law Judges, whose assistance was procured by the Lord Chancellor, as by Lord Cranworth himself. The Judges pointed out that the action to be brought could only be one and the same action on the specialty, and not on any new promise express or implied from the terms of acknowledgment, whatever it might have been. They held that a devisee, who might plead the bar, if it existed, could only plead it in such single action; and observing that he was capable of making the acknowledgment, and the

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(1) 1 Ir. Ch. R. 106.
(2) 1 De G. & J. 1.
(4) L. R. 12 Eq. at p. 53.
(3) L. R. 2 Ch. 112.

M. R.
1894.
LEAHY
v.
DE MOLEYNS.

Statute of Fraudulent Devises (3 & 4 Wm. & Mary, c. 14, s. 7) having declared that the devisee should be liable and chargeable in the same manner as the heir, they concluded, without hesitation, that the devisee might, properly be said to be liable by virtue of the indenture, 'as either the real or personal representative,' and therefore that, by the acknowledgment, the action—the only action that could be brought—was set free generally, the statutes having nowhere said that it could be brought only against the party making the acknowledgment. Lord Cranworth, who concurred with the Judges, 'not only in the result at which they arrived,' but in the reasoning 'which led them to their conclusion,' and also after a thorough investigation of the case, gave very fully his reasons for the independent judgment which he pronounced, and was satisfied that the devisee for life, who there had made the payment, was a 'party interested.' There remained, as he said, the question, 'who is affected by such payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it free the action generally? I have come to the conclusion, that where a part payment, or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment but also against all other persons liable on the specialty.' And then further examining the words of the statute, he says: 'It does not, in terms, confine his right to a right of action against the person who has made the payment, and we can have no right to introduce words for the purpose of so confining it.' "

Here payment was not made by the tenant for life, but by the owner of the mortgaged estate who was the person liable to pay, and that case appears to be an authority for the proposition that the debt was thereby kept alive. *Chinnery* v. *Evans* (1), is not in point, for it only establishes that where several estates are included in one mortgage, payment of interest in fact made out of one portion of the mortgaged estate will save the statute as to all.

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(1) 11 H. L. Cas. 115.

But this is very different from the present question. On the other hand *Dickinson* v. *Teesdale* (1) is not an authority the other way. There there were two estates and the debts were charged by will moietively on each. It was held in that case that payment out of one moiety did not keep the debt alive against the other moiety, but this was so decided because the charge being by will each estate bore its own moiety as a separate liability in the hands of the owner of that moiety, and therefore it was the same as if different debts had been charged on different estates. There is no case in which it has been held that the payment of interest on a mortgage out of the rents of the lands does not keep the mortgage debt alive for all purposes; and on principle I am clear that it does. The mortgagee who receives his interest need not concern himself from what source it comes, if it come from a person liable to pay, and I think the owner of the mortgaged lands is such a person. In my opinion, therefore, the Statute of Limitations is no bar to the action.

But the much more serious question remains as to lapse of time and the matters which have occurred since the death of Richard Chute, the mortgagor. If it were a mere question of the right to maintain an action there would be no difficulty as the case is presented by the plaintiffs. But it is not an action on the covenant against the executor in which there would be a decree and an inquiry as to assets, but it is now an action to follow assets. The plaintiffs do not rely on a devastavit by Mr. De Moleyns; that would be barred by statute. But if there are further assets in the hands of the executor as such, the action would clearly lie, and the case was as I have said so presented at first. There are in the hands of the defendant Mr. De Moleyns funds which at one time were assets. But are they in his hands as executor? I am of opinion that they are not. *Phillippo* v. *Munnings* (2), where the question was considered, is the leading case on this subject, and in *Henderson-Roe* v. *Hitchins* (3), where the question arose in the case of a residuary gift, North, J., says:—"I think the point is clear. The testatrix after directing payment of her debts, and funeral and testamentary expenses, and bequeathing some pecuniary legacies, left 'the residue of her money' to an infant. She also bequeathed some specific legacies. It is the duty of the executor to clear the estate—to pay the debts, funeral and testamentary expenses, and the pecuniary legacies, and to hand over the assets specifically bequeathed to the specific legatees. When all this has been done, a balance will be left in the executor's hands, and I think it is plain that this balance will be held by him in trust for the infant within the meaning of section 43. In *Phillippo* v. *Munnings* (1) the question arose, whether a suit against an executor of an executor to recover a sum of money which the original testator had bequeathed to his executor upon certain trusts, the ultimate trust being for John Buscall, who was dead intestate, the plaintiff being his next-of-kin, was a 'suit to recover a legacy' within the meaning of the Statute of Limitations, 3 & 4 Will. 4, c. 27. The defendant's testator had set apart the sum of £400 to answer the legacy. Lord Cottenham held that the suit was not a suit to recover a legacy. He said: 'The whole fallacy of the defendant's argument consists in treating this suit as a suit for a legacy. Now the fund ceases to bear the character of a legacy, as far as it assumed the character of a trust fund. Suppose the fund had been given by the will to anybody else as a trustee, and not to the executor, it would then be clearly the case of a breach of trust.'" He then refers to the case of *Dix* v. *Burford* (2), and concludes as follows:—"In my opinion, it makes no difference for this purpose whether a pecuniary legacy payable out of the estate is given to an infant, or the remainder of the testator's estate is given to an infant, so soon as that residue is ascertained. I might refer to many other cases, but I think that these two are sufficient to show what the clearly settled rule of law is. In my opinion the residue of the money in the hands of the executor, after satisfying all the previous trusts of the will is property held in trust for the infant within the meaning of section 43."

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(1) 1 De G. J. & S. 52. (2) 2 My. & Cr. 309. (3) 42 Ch. D. 304.

There is no difference between an ascertained residue and an ordinary legacy in this respect. The executors in this case have on the uncontradicted evidence long since made themselves trustees with the assent of the legatees and must be taken now to hold the money and securities in that capacity and not as executors of the man who died in 1862. For this reason, the assets if they are to be made liable at all to the plaintiffs' claim, can only be got at by the equitable jurisdiction of this Court to follow assets into the hands of legatees and so render them available.

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(1) 2 My. & Cr. 309.

(2) 19 Beav. 409.

This is a purely equitable right and must be subject to the doctrines of a Court of Equity.

The question then is, in this, as in all other cases of the sort, is it equitable that this right of following assets should be extended to the plaintiffs under all the circumstances of the case?

The answer to this question must depend upon the view which is to be taken of the conduct of the parties on both sides.

I am clearly of opinion, that the added defendants are not entitled to the benefit of the Trustee Act, 1888, section 8, as persons "claiming through" a trustee. That I think clearly points not to beneficiaries but to persons deriving property from and subject to the liabilities of the trustee or executor; that is generally speaking his executors, administrators, or assigns. It would be absurd to hold that a *cestui que trust* claiming to hold property by reason of a breach of trust should be in a better position as regards the estate than one who had obtained it apparently rightfully and without any apparent or intentional breach of trust, and that the right of a creditor to follow assets should be defeated merely by showing that they were acquired by the holder without colour of title.

The next question is, How has this property been dealt with? When Richard Chute died in 1862, there can be no doubt that Dr. Butcher (the Bishop) and Henry Leahy at all events knew of his death. They are proved to have been both intimate friends of his, and there is no possibility of holding that his death was fraudulently concealed from them, or that they did not, in fact, know of it perfectly well. There is no proof that they knew of the precise terms of his will, or even that he had left a will at all, though it is impossible to prove that they did not, and there is no presumption either way. I am quite sure, however, that they did know of his death and that their security was most materially affected by that event. Part of the security was his life estate in certain of the lands mortgaged and in the rent of £105, and both these securities were gone, and gone to their knowledge. Further, they must have known that whatever the terms of his will may have been, or even if he died intestate, his personal estate must be distributed or dealt with at the time by his executors or administrators as the case might be; and that in due course they ran a certain risk of its being parted with to their prejudice. No doubt the executors of Richard Chute omitted to take the precaution of publishing statutory notices to creditors; nor indeed would such publication have protected them in respect of a debt of which they had notice. It is also the fact that the executors did not call upon the mortgagees (as they might have done) to say specifically whether they did or did not object to the residue being paid away or dealt with irrespective of the mortgage. But admitting all this, surely the mortgagees ought in prudence to have made inquiry whether such a course was being pursued. It is said, and truly, that the mortgagees might possibly have supposed that a sum would be kept and set apart to meet the possible event of the mortgage debt being claimed as against the assets under the covenant. But it would have been a prudent precaution (to say the least) to have inquired about this within some reasonable time. Had they done so, and found that a course which might prejudice their rights was being pursued, they could have interfered in a way which would have protected their own interests and those of the persons who would then have been put upon their guard. This was specially so in a case where the death of the mortgagor directly affected their security in the way I have pointed out. But they took no step to indicate any such intention or wish for twenty-nine years. This seems to me to furnish a very strong reason for holding that they were satisfied, and allowed themselves to be regarded as satisfied, with the security they held even in its impaired condition, and were not concerned to preserve any other rights whatever in respect of the debt.

On the other hand what was the dealing with the assets by those who represented the assets of the mortgagor? Marriage settlements were executed on the marriage of the testator's daughters in 1879 and 1889 respectively, in obvious good faith that the shares of the daughters then put in settlement were not subject to any outstanding liability of the testator's estate.

In *Dilkes* v. *Broadmead* (1), where a bill had been filed against Mrs. Broadmead (as the representative of her father James Bucknell) and her husband, and by amendment against the trustees of her marriage settlement, charging that the estate of James Bucknell was liable for a breach of covenant to repair premises demised to James Bucknell by Captain Dilkes, whose personal representative the plaintiff was, Stuart, V.-C., says:—"There is no imputation as to the honesty with which the assets were dealt with, and it is clear that they might have been reached, if they had passed into the hands of a volunteer; but having been transferred to the possession of trustees upon the marriage of the defendants, upon the trusts of the settlement, they are protected by the consideration of marriage; and without overruling the case of *Spackman* v. *Timbrell* (2) it would be impossible for me to grant the plaintiff the relief which he asks, or allow him to follow the assets."

Since 1879 and 1889, and indeed from the date of the death of the testator, modes of life and social habits have been acquired by the legatees and all the testator's family entirely different from what would have been the case had they been aware that the assets of the testator were liable to the plaintiff's claim It would be too late for them now to try to remodel their careers and fit themselves for earning a living under altered conditions and circumstances. I am of opinion that the money which was settled on the daughters by the settlements cannot now be brought back. I do not mean to say that the execution of a marriage settlement immediately after the death of a testator would prevent a creditor from following the assets settled thereby, if he took steps within a reasonable time. There would have been no laches in such a case. But when, as here, other rights have been acquired by lapse of time and inaction on the part of the creditor, the shares put in settlement cannot be touched.

Is there any distinction to be made in the case of the two unmarried daughters? The observations I have made as to a change of mode of life and habits equally apply to them. The truth is, the security was regarded by all parties as perfectly adequate, and the question of the personal covenant was not dreamed of as being of any moment whatever. It is curious to notice that while in former days the effort of a creditor was always to throw the burden of his debt upon the land, at the present time, owing to the decline in the value of land, the attempt very often is the converse, and he seeks to get at the estate of his debtor by virtue of the personal liability. I have had many such cases here. If the rights of the plaintiffs were barred against the shares in settlement, but not against the shares of the unmarried daughters, the result would be that they would have to bear the whole liability, without the right to resort to the shares of their married sisters.

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(1) 2 Giff. 113.

(2) 8 Sim. 253.

Had the plaintiffs taken steps within a reasonable time their debt might have been paid off out of the personal estate, and those entitled to it would have had the benefit of the security as against the lands. Thus they would have been in a position to sell it at a time when its value was ample, and so have recouped themselves without the disastrous loss occasioned by nearly thirty years inaction during which the value of the property has gone down in the way the plaintiffs allege. Now, does this conduct or inaction on the part of the mortgagees constitute such laches as to render it inequitable for them to have resort to the equitable aid of the Court?

The general proposition is that mere inaction or nonclaim will not of itself, and apart from the Statute of Limitations, defeat a right, even an equitable right, such as is claimed. But there may be a bar founded on laches and acquiescence altogether apart from the statute. It is a question depending on the facts of each case. In *Blake* v. *Gale* (1) (affirming the decision of Bacon, V.-C. in 31 Ch. D. 191) the case mainly relied on by the defendants on this point, the facts, which I need not repeat, differed materially from those in the present case. But the law is very clearly stated: Cotton, L.J., at p. 577, says: "The case is in many ways singular, and is one to which there appears to be no parallel in the reported

(1) 32 Ch. D. 571.

cases. Here is a mortgagee who says, 'My interest has been duly paid. I had no ground therefore for commencing any action at an earlier period, and insist on my right as a creditor because my mortgage is insufficient.' Then on the other hand we have this startling fact before us, that the legatees have been in possession of their shares of the residue for more than twenty years, and that it had been decided that the executors are not liable for having divided the estate as they did. The Vice-Chancellor held that under those circumstances the mortgagee as creditor had lost his right as against the present defendants." He then considers *Ridgway* v. *Newstead* (1), and proceeds (at p. 579) thus: "Though I do not rely upon delay here as barring any right which the mortgagees might have, yet it is not to be disregarded as helping what is, in my opinion, the true construction of those letters. The mortgagees for many years never in any way adverted to their right as against the personal estate, though they knew from the first that the shares of the unmarried daughters were to be expended in carrying on the farm, with a probability that they would be usefully employed in cultivating it, but with a risk of their being wholly lost. In my opinion, this assent to the division prevents the mortgagees from saying that the personal estate is still liable to them. It is an equitable release of the right which they would otherwise have had, to fall back on the personal estate if from any reason or under any circumstances their security become deficient. To allow creditors after such an assent to the distributing of the personal estate, to come after this lapse of time to recover the personal estate from the residuary legatees, would, in my opinion, be wrong, and contrary to what, under the circumstances, is just between the parties. It must be remembered that the right of the creditors to proceed against the residuary legatees is simply a right given by equity in order that justice may be done. It does not depend on any right against the executor, because even if the executor has distributed the assets under the decree of the Court, so that there is no claim against him, still creditors who come within a reasonable time and have not in any way barred themselves retain their rights as against the legatees.

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(1) 3 D. F. & J. 474.

Here, having regard to the knowledge and the assent of these creditors, in my opinion it would be wrong to give the relief against the legatees."

I have read these passages because they refer to the facts which distinguish the case from the present. Bowen, L.J., says, at p. 581, "I am of the same opinion. It seems to me quite clear that Mr. Rogers was right when he said that this question was an equitable one, and that what we had to decide was whether a Court of Equity under the circumstances of this case would give the mortgagee recourse to parties against whom he has no claim at law. If the question depended simply on the lapse of time during which the mortgagee of the real estate has received payment of interest difficult questions might arise which it is not necessary to decide on the present occasion. When we find that a long time has elapsed during which the right has never been insisted upon, and also when neither the Statute of Limitations applies, nor can the analogy of the statute be invoked according to the well known way in which Courts of Equity occasionally invoke it, what have we to do? We have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn, the claim will, for the purpose of quieting possession, be treated as abandoned. Now I certainly do not propose to rush in where the Lord Justice Cotton has hesitated to tread, or to attempt to lay down any general rule as to what will debar a mortgagee of real estate from following assets into the hands of the legatee. Each case must depend on its own circumstances."

No doubt the facts as to positive knowledge were stronger there than here, though the time which had elapsed was not so long. Still, as Bowen, L. J., says, each case must depend on its own circumstances.

That case was largely decided on the authority of *Ridgway* v. *Newstead* (1), which is the only remaining case to which I shall

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(1) 3 D. F. & J. 474.

M. R.
1894.
Leahy
v.
DeMoleyns.

refer. *Ridgway* v. *Newstead* (1) has never been overruled or questioned, and it is the leading authority on this branch of the law to the present day. In it there was a delay from March, 1843, to January, 1860, that is less than seventeen years. Here it is twenty-nine. There was there, as appears by the report of the case both before the Lord Chancellor and also before the Vice-Chancellor whose decision (reported in 2 Giff. 492) was affirmed, no more proof of knowledge or active acquiescence than exists in this case. The circumstance on which the case turned was delay, coupled with the fact that the security was a wasting one, liable to depreciation, a circumstance which exists here, and must have been directly present to the minds of the mortgagees in a far more definite and tangible shape. The same ground was taken by the Vice-Chancellor and the Lord Chancellor; the latter there says:—"The plaintiffs make out a *prima facie* case for the relief prayed by the facts alleged in the bill, and not controverted. A creditor generally has a right, after the death of the debtor, not only to sue the personal representatives of the debtor, who have in their hands assets unadministered, but to follow the assets of the debtor in the hands of a legatee. This doctrine is fully established by the cases of *Gillespie* v. *Alexander* (2); *Greig* v. *Somerville* (3); *March* v. *Russell* (4); and *Davies* v. *Nicolson* (5). The general rule was fully admitted in the recent case of *Dilkes* v. *Broadmead* (6), in which we had occasion to consider the exception to it from the assets having been *bona fide* alienated by the legatee to a purchaser for value. I have now to determine whether the defendants have rebutted the claim. The first answer, that there is no evidence of any assets of the creditor having come into the hands of the legatee, John Tenney Newstead, must, I think, be overruled, for, although there were not payments of the annuity made to him, the sum which he received on the sale of the annuity must, I think, be considered as coming out of the estate of Thomas Newstead, the testator. Therefore, if the claim of the plaintiffs could be supported against John Tenney Newstead, he is equally liable, as if he had

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(1) 3 D. F. & J. 474.

(2) 3 Russ. 130.

(3) 1 Russ. & My. 338.

(4) 3 My. & Cr. 31.

(5) 2 De G. & J. 693.

(6) 2 De G. F. & J. 566.

M. R.
1894.

LEAHY
v.
DE MOLEYNS.

received the amount of the sum paid to him, as the value of the annuity, by periodical payments of the arrears of the annuity. The counsel for the defendants placed more reliance on lapse of time; and they strenuously contended that, without imputing any laches to the mortgagee or his representatives, or having regard to any of the particular circumstances of this case, the right of the plaintiffs having accrued in 1842, and they not having taken any steps to enforce it till 1857, they are barred by the lapse of fifteen years. Mr. Elmsley urged truly that this is an equitable claim, the legal title to the assets paid to the legatees being in the legatees, subject to the equitable claim of the creditors of the testator; and he insisted that all equitable claims must be brought forward promptly. If he had added, 'before the rights and liabilities of others have been varied by lapse of time,' I should have been disposed to acquiesce in his position. He declined to give a definition of 'promptly,' or to fix any definite period of time within which the claim must be prosecuted—denying, indeed, that twenty years, or any certain period can be named—but arguing that, as a period of eighteen years has been held to be sufficient to bar an equitable claim, a period of fifteen years must be held sufficient. He relied on the cases of *Bonney* v. *Ridgard* (1), and *Gregory* v. *Gregory* (2). But when these cases are examined, although lapse of time is mentioned as the reason of the decision, it will be found that it was a lapse of time which had varied the rights and liabilities of others. In *Bonney* v. *Ridgard* (1), Lord Kenyon, then Master of the Rolls, says: 'Here the many persons through whose hands the property has passed have relied on the undisturbed possession, and have laid out considerable sums of money in the improvement of it, upon that idea.' Another reason given by him is, that 'it would be too much, at this length of time, to give the plaintiffs the relief required where the accounts cannot be taken.' Therefore, he thought it right to say, 'that the length of time was a bar in this case.' In *Gregory* v. *Gregory* (2), Sir William Grant says that in all the cases in which length of time has not been allowed to operate against the title to equitable relief, it has been shown that there has been a continuance of the circumstances under which the transaction first took place. How then can these be considered as authorities to prove that, if circumstances remained exactly the same as at the commencement of the transaction, the lapse of fifteen years or of eighteen years is of itself a bar to the equitable relief so prayed? But although I cannot accede to the general rule contended for as to the effect of mere lapse of time, all circumstances remaining the same, I am of opinion that, in the present case, there are circumstances which, coupled with lapse of time, are a bar to the equitable relief prayed. I by no means say that, generally speaking, any laches can be imputed to a mortgagee who, during any period however long regularly receives payment of the interest of his mortgage money, if he quietly relies upon all the remedies which the law gives in respect of the mortgaged land, and of the personal liability of the mortgagor. But, in the present case, I think that there are circumstances to take it out of the common rule as far as the equitable claim against the legatees of the mortgagor is concerned."

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(1) 1 Cox, 145.

(2) 1 Coop. 201.

What were the circumstances? The Lord Chancellor proceeds to state them:—"The mortgage for £3000, at £5 per cent interest, executed in 1838, was on buildings, machinery and premises, in which the mortgagor carried on the business of a brewer. The brewery was at that time considered an ample security for the mortgage money, and it so continued after his death, when his son succeeded him in the business. The son carried on the business there, till 1856, when he became bankrupt. The mortgaged premises were then sold, and the highest price that could be obtained for the whole of the mortgagor's interest in them was £850. As to part, this interest consisted of a term of ninety-nine years; and as to the residue, of a term for 999 years. It was not till the result of the administration suit showed the insufficiency of the security, that the legatees were resorted to. I have no doubt that the legal claim against the unadministered assets remained in full force, but the equitable claim against the legatees I think was gone. The consideration that this was a wearing security is not to be entirely disregarded, although probably an actuary would say that the value of the terms was very little reduced by the lapse of twenty years. But what I chiefly rely upon is, the nature of the property mortgaged, which had acquired a temporary value from the machinery erected upon it, and the goodwill of the trade carried on in it. If the plaintiffs thought that there was a mortgage of 'the potentiality of growing rich beyond the dreams of avarice,' they cannot, when the boilers and vats produced so small a sum, reserve to themselves the remedy which they might have had if they had acted with prudence and discretion. Interest was received on the mortgage for twenty years at £5 per cent., a rate considerably higher than the current rate of interest on good real security. From the sum which the mortgaged premises produced at the sale, it is quite clear that a considerable part of the estimated value at the time of the mortgage had consisted of the goodwill of the trade. Indeed there can be no doubt as to the deterioration, for at the hearing before the Vice-Chancellor, an inquiry was offered on this subject and was declined. The plaintiffs having preferred to receive the high interest, which has been said by very high authority, to be 'another name for insufficient security,' is it just that they should now be allowed to come upon a legatee who by the terms of the will was to be in receipt of an annuity £150 a year for his maintenance and who must be supposed to have spent the amount year by year as he received it? Is not his situation altered and prejudiced by the delay? If the plaintiffs had made their demand upon him soon after the death of the testator, he would have known that he could not rely upon the annuity for his support, and he would have regulated his expenditure and mode of life accordingly. From the acquiescence by the mortgagees in the manner in which the estate of the testator was administered, might not the legatee have reasonably supposed that the mortgagees were contented with the sufficiency of their security, and that it would be absurd in him to forbear to enforce payment of his annuity, or to hoard it up half year after half year, lest he should afterwards be called upon to pay back all that he had received. If it would be a hardship upon the mortgagees not to have full payment of the mortgage money on account of the trade carried on in the mortgaged premises having unexpectedly failed, would there not be a greater hardship on the legatee if he were called upon to pay back sums which, with good faith and without imprudence, he has spent in the support of his family? The mortgagees clearly have no legal, and I am of opinion that they have no equitable claim against him."

I think that the principle of *Blake* v. *Gale* (1) and *Ridgway* v. *Newstead* (2) rules this case, and I am of opinion that as regards the residuary personal estate the action cannot be maintained.

The plaintiffs were driven to argue that no delay, even for fifty years or a hundred, would itself operate as a bar. This may be so, though it is a strong proposition if there were no other circumstances. But the circumstances here are not solely the execution of the mortgage and the existence of personal estate, which formed part of the property of the mortgagor.

As regards the other lands of the testator, not the subject of the mortgage, the case is even clearer. Personalty is the primary fund out of which contract debts are to be paid. If the plaintiffs have lost by laches the right to resort to it, *a fortiori* they cannot go against the lands which have been possessed and enjoyed during all this time, so as to deprive the devisees of the right they would otherwise have had to compel the personal estate to bear its own burden.

The action, therefore, fails on both branches of the case. If the plaintiffs desired it, there must be an account to ascertain whether there are any assets in the hands of Mr. De Moleyns as executor. But the case has proceeded on the basis that there are no such assets. As the plaintiffs, however, do not desire an account, there will be judgment for the defendants with costs, including the costs of discovery.

W. L.

Appeal.
1895.
Jan. 29–31.
Feb. 1, 4, 5.
June 29.

The plaintiffs appealed to the Court of Appeal (Walker, C., and Fitz Gibbon and Barry, L. JJ.).

Matheson, *Q.C.*, and *Meredith*, *Q.C.* (with them *Jefferson*), for the appellants.

(1) 32 Ch. D. 371.

(2) 3 D. F. & J. 474.

Law, Q.C., *Kenny, Q.C.*, and *J. Herbert Shaw*, for the defendant De Moleyns.

The Right Hon. John Atkinson, Q.C., and *Morphy*, for the defendants F. B. Chute and Richard Chute.

Daniel Mahony, for the defendant Thomas A. Chute.

Price, Q.C., and *C. W. R. Brady*, for the other defendants.

June 29.

WALKER, C. :—

The plaintiffs Thomas Leahy and Samuel Henry Butcher sue as existing trustees of a settlement dated November 22, 1847, and having vested in them, as such, a mortgage security for £3109 representing the investment of a trust fund held upon the trusts of that settlement. This settlement was made upon the marriage of the Rev. Samuel Butcher with Mary Leahy, and the then trustees were John Leahy and the Rev. Francis Crawford. On December 15, 1855, those trustees, under the powers in the settlement, invested the £3109 upon the security of a mortgage given by Richard Chute of Chute Hall. John Leahy and the Rev. Francis Crawford were parties to that mortgage of the fifth part, and by it Richard Chute of Chute Hall, and Richard Chute of Leebrook, at his request granted to the trustees and their heirs, subject to redemption, the lands of Portduff and Ballynaboul, held under a lease for lives renewable for ever; and also Richard Chute of Chute Hall, and Edward De Moleyns, at his request granted to the trustees and their heirs the lands of Dulaigue and Broughane, subject to the fee-farm rent payable thereout, and the proviso for redemption; and Richard Chute of Chute Hall also granted unto David Mahony and his heirs his life estate, under a settlement of October 18, 1836, in the lands of Portduff and Ballynaboul, and a fee-farm rent of £105 payable out of Dulaigue and Broughane, to hold to the use of John Leahy and Francis Crawford and their heirs during the life of Richard Chute, subject to redemption. The mortgage contained a proviso for redemption on repayment of £3109 on January 1, 1857, with interest at 6 per cent. in the meantime, and Richard Chute for himself, his heirs, executors, and administrators, covenanted with the trustees to pay the £3109, with interest, at the time appointed for payment thereof. There was also a proviso for the reduction of the interest from 6 per cent. to 4½ per cent., if paid within three months from each January 1st and July 1st, and also that the principal money should not be called in or paid off before January 1, 1865, in case the interest were paid pursuant to the deed on every January 1st and July 1st, or within three months thereafter.

In the year 1860 John Leahy desired to be discharged, and upon June 6, 1860, Henry Leahy was duly appointed a trustee in his place, and the mortgaged lands and mortgage debt and the benefit of all covenants and securities for the same were duly vested in Francis Crawford and Henry Leahy.

Richard Chute the mortgagor died on September 13, 1862, and by his will, after directing payment of his debts and legacies out of his personal estate not specifically bequeathed, he devised the mortgaged lands to his son the defendant Thomas Aremberg Chute for life, with remainder to his first and other sons in tail male, with like remainders to his other sons; and he devised other freehold lands in Kerry to his son Richard Trevor Chute for life with remainder to his first and other sons in tail male, with like remainder to Thomas Aremberg Chute; and he bequeathed to William Harnett and Edward De Moleyns a charge of £1000 vested in him, and a charge of £1384 12*s.* 3*d.* also vested in him, and the residue of his real and personal estates upon trust to convert and pay thereout his debts and funeral and testamentary expenses, and invest the surplus in Government or real securities, and stand possessed thereof in trust for all his children by his then wife born or to be born, save Thomas Aremberg Chute and Richard Trevor Chute, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with power to apply the income for maintenance; and he appointed William Harnett and Edward De Moleyns trustees and executors of his will, and they both proved the will on December 23, 1862.

Henry Leahy one of the trustees having died, the plaintiff Thomas Leahy was duly appointed a trustee in his place on October 6, 1870, and the mortgage debt of £3109 and the mortgaged lands so far as subsisting were assigned to and vested in Francis Crawford and Thomas Leahy.

In the year 1877 Francis Crawford desired to be discharged from the trusts, and by deed dated January 1, 1877, the plaintiff Samuel Henry Butcher was appointed a trustee in his place, and the mortgage debt of £3109 was assigned to the plaintiffs, and the mortgaged lands were conveyed to them to hold upon the subsisting trusts of the settlement. Considerable argument was addressed to us upon the differences in these latter deeds by which new trustees were appointed, and there was sought to be inferred an abandonment of the claim against the personal assets. It seems to me that this would be an unnatural inference to draw. The differences are, I think, unimportant.

Richard Chute left the following children: Thomas Aremberg Chute, Richard Trevor Chute, Francis Blennerhasset Chute, Marion Chute, Rose Chute, Dora Chute, Frances Chute, and Emily Chute. The sons entered into possession of the lands devised to them, but Richard Trevor Chute died in the year 1880, whereupon Thomas Aremberg Chute, under the provisions of Richard Chute's will, became entitled for life to Richard Trevor Chute's lands. The personal estate of Richard Chute, including the two charges of £1000 and £1384, was according to the schedule of assets sworn to amount to £11,436 9*s.* 10*d.*, and the residuary account passed on November 14, 1864, stated the net assets constituting residue to be £8707 11*s.* 2*d.* which by the accounts the executor retained for the daughters, and Francis Blennerhasset Chute. This also included a debenture on the Kerry Club of £50 and debentures of small value in the Tralee Gas Company, and Tralee Market Company.

Thomas Aremberg Chute the devisee of the mortgaged lands, paid the interest on the mortgage of £3109, to about the year 1886, but it then fell into arrear, and on February 13, 1888, Thomas Aremberg Chute appointed John Townshend Trench receiver over the mortgaged lands for the purpose of paying the interest on the mortgage, and the interest continuing in arrear, the plaintiffs filed a petition in the Land Judge's Court on which an absolute order was made on May 12, 1890, and the proceedings are still pending. It may have been found impossible up to this to sell the lands, and (it is alleged) there will be a considerable deficiency to meet the mortgage.

Appeal.
1895.
LEAHY
v.
DE MOLEYNS.
Walker, C.

As one of the main questions in the case is whether, or how far the personal estate was paid to, or appropriated for the beneficiaries, it is material to state the dealings with the estate by the executors. The mode in which the estate of Richard Chute was dealt with, appears to be the following:—William Harnett and Edward De Moleyns proved the will on December 23, 1862. Of the five daughters, one Frances died under age on August 10, 1871; Marion attained twenty-one on June 17, 1871; Dora on June 24, 1876; Rose on April 25, 1879; and Emily on December 30, 1882. The executors paid the debts, save the mortgage for £3109, and they passed a residuary account on November 14, 1864. They did not publish notices for debts, but they of course knew of the mortgage. On February 5, 1869, the executors invested £1297 17*s.* 7*d.*, portion of the residuary assets, on the security of a mortgage from Francis Blennerhasset Chute to Harnett and De Moleyns. The deed contained a declaration that the money belonged to them upon a joint account. The interest was paid by or on behalf of the mortgagor to or for the daughters and not by Mr. De Moleyns. Mr. Harnett died on December 27, 1886. The mortgage was paid off on July 28, 1892, after this action was brought, and was invested by Mr. De Moleyns in £1337 2*s.* 7*d.* consols, and he has paid the dividends to the four daughters, and subject to any question of appropriation for these daughters, this sum is in the hands of Mr. De Moleyns still. In the year 1865, Harnett and De Moleyns invested £386 18*s.*, portion of the assets, in the taking over of so much of a charge of £1661 10*s.* 9*d.* on the estate of Francis Chute. By deed dated August 5, 1865, Arthur Denning in whom the charge was vested assigned to Melicent Agnes Chute, William Harnett, and Edward De Moleyns, this charge of £1661 10*s.* 9*d.* to hold as to £1274 12*s.* 9*d.*, for Melicent Agnes Chute, and as to £386 18*s.* for Harnett and De Moleyns. By deed dated April 29, 1867, Melicent Agnes Chute assigned to Harnett and De Moleyns this £1274 12*s.* 9*d.* and the deed contained a declaration that the £1274 12*s.* 9*d.* was vested in them on a joint account. The charge of £1661 10*s.* 9*d.*, is still vested in Mr. De Moleyns, but the interest has been paid direct to the beneficiaries. It is therefore circumstanced in the same way as the £1337 4*s.* 7*d.* The other outstand-

Appeal. 1895. LEAHY v. DE MOLEYNS. Walker, C.

ing assets consist of £50 Debenture County Kerry Club, and £20 Tralee Market Company, the interest of which has been received by the beneficiaries.

In the year 1879, one of the daughters got married to Milhelm Shakoor, and a settlement was executed, dated November 10, in that year, and made between Mr. Shakoor of the first part, Marion Chute of the second part, and trustees Edward J. Saunderson and Francis Blennerhasset Chute of the third part. It recites the will of Richard Chute and bequest of the residue, and that Rose and Emily, two of the daughters, were still under twenty-one, and Marion Chute thereby assigns to the trustees all the estate, right, title, and interest vested or contingent of her the said Marion Chute, under the will of her father in the sum of £2000, and the two charges of £1000 and £1384 12*s.* 3*d.* and the residuary estate of Richard Chute (save a small sum paid to her), to hold upon the trusts of the settlement. This appears to have been an assignment merely of her share whatever it might be, and the trustees did not get possession of the property.

Rose Chute, on September 27, 1889, married Henry Dudgeon, and a settlement was executed as of that date, between Henry Dudgeon of the first part, Rose Chute of the second part, the Hon. Mrs. Rose Chute of the third part, and Joseph Hume Dudgeon, and Thomas C. Oliver of the fourth part. It recites the will of Richard Chute and proceeds: "And whereas the said testator left besides the said two sons, five daughters, of whom one Frances died under age and unmarried, and the remaining four have attained twenty-one, and accordingly the said sums and residue became divisible into fourths and the said Rose Chute is entitled to one-fourth thereof. And whereas the portion of the said residuary assets now outstanding is a mortgage for £1297 17*s.* 7*d.*, dated February 5, 1869, executed by Francis Blennerhasset Chute, to the said William Harnett and Edward DeMoleyns:" and in the operative part Rose Chute assigns to the trustees *inter alia*, "All that her one-fourth or other share of, and in the said sums of £1000 and £1384 12*s.* 3*d.* now vested in the said William Harnett and Edward De Moleyns, under the said will of her father, and also all that her one-fourth share of the said sum of £1297 17*s.* 7*d.* secured by the aforesaid mortgage of

February 5, 1869," to hold upon the trusts of the settlement. It is alleged by the trustees of the settlement, and Mr. De Moleyns supports their allegation by his affidavit, that this settlement omitted by mistake from it Rose Chute's share of the £1661 10*s.* 9*d.* and the debentures.

The rest of the residuary assets consisted of £2010 12*s.* 10*d.* Government stock and £409 Government stock which were sold out in 1879 and in 1883 and were distributed in equal fourth parts amongst the four surviving daughters.

The result is to leave standing in the name of De Moleyns the £1661 10*s.* 9*d.* and the £1337 2*s.* 7*d.* and the two debentures.

Inasmuch as I am of opinion that in this case the plaintiffs can follow into the hands of the daughters or the trustees the rest of the assets, it is not material to consider whether there is any distinction between the classes of funds; but as regards the funds actually in the executor's hands with debts unpaid and a clear residue not created, I think the beneficiaries are not persons in the position of legatees who have received the fund. I think the frame of the two settlements prevents them being considered purchasers for value of any specific property, and therefore I think married and unmarried daughters stand practically in the same position.

The writ in the original action was issued on March 25, 1891, and it named as the only defendants Edward De Moleyns the surviving trustee and executor of the will, and the devisees of the lands, viz. Thomas Aremberg Chute the owner of the mortgaged lands, and Francis B. Chute and Richard Chute the tenant for life and tenant in tail in remainder of the other devised lands. The writ merely prayed to have the real and personal estate of Richard Chute, deceased, administered. When the case came before the Master of the Rolls he required the action to be amended by bringing before the Court the persons who had received or were entitled to the residuary estate; accordingly the writ was amended by adding as defendants Edward J. Saunderson and Francis B. Chute the trustees of Mrs. Shakoor's settlement, and Joseph Hume Dudgeon and Thomas Creswick Oliver, the trustees of Mrs. Dudgeon's settlement; also Dora Chute and Emily Chute, the two unmarried daughters. The amended writ adds a prayer that if necessary it may be declared as to any residuary personal assets of the testator which at the commencement of the action remained in the possession of Edward De Moleyns as the surviving executor of Richard Chute, or which had been previously thereto transferred or paid over to the residuary legatees or to any trustee or trustees for them or any of them, that the said personal assets are liable to discharge the claim of the plaintiffs as specialty creditors.

The defences put forward to the action on the part of Mr. De Moleyns and the other defendants are:—The Statute of Limitations inasmuch as no interest was paid out of the personalty, but only out of the rents of the mortgaged lands which it is contended does not keep alive the claim against the other devised lands or personal estate. Mr. De Moleyns also contends that so far as any claim against him is founded upon a *devastavit* or breach of trust such claim is barred by the statute; and he further submits that he is as executor a trustee within the meaning of the Trustee Act, 1888: and those representing the four daughters contend that they claim through a trustee within the meaning of section 8 of the same statute. Mr. De Moleyns is not sought to be made liable upon foot of a *devastavit*, and the relief is limited to assets in his hands or which can be followed.

The main defence, however, is that plaintiffs elected to rely upon the security of their mortgage only, and that, knowing of the death of Richard Chute, they allowed his assets to be segregated and distributed without making any claim, even though, by the death of Richard Chute, a portion of their real security was lost; and, on behalf of Mrs. Shakoor's and Mrs. Dudgeon's trustees, the settlements executed upon their marriages are relied upon as settlements for value of their shares, and it is said that Mrs. Dudgeon's settlement of September 27, 1889, by mistake, and contrary to the agreement preceding the marriage, was limited only to her fourth share of £1297 17*s*. 7*d*., whereas it should have included her share of the £1661 10*s*. 9*d*. and of the two debentures, and that this setlement should be reformed, or treated as reformed; and on behalf, especially, of the beneficiaries, it is contended that the claim to follow the assets is equitable only, and that after the laches which has taken place, and delay in assertion of rights since 1862, it would be inequitable to allow the personal assets to be resorted to when the legatees had been allowed to regulate their modes of living, and undertake obligations in the belief that these legacies would not be resorted to, whereas the mortgaged lands would have been quite sufficient security if a sale had been enforced within a reasonable time after the testator's death.

The passages in Mr. De Moleyns' affidavit, so strongly relied upon, are contained in paragraph seven: "I say that the said Henry Leahy, and, I believe, Francis Crawford, the persons in whom, at the date of the death of the said Richard Chute, the said mortgage debt for £3109, and the securities therefor were vested, were well aware of the death of the said Richard Chute, and of the segregation and distribution of his personal estate. The said Henry Leahy and Dr. Samuel Butcher were both intimately acquainted with the said Richard Chute." And, again: "I say that the said Henry Leahy and Francis Crawford were content with the sufficiency of the security of the lands for the said mortgage debt of £3109, and acquiesced in the said segregation and distribution of the residuary estate of the said Richard Chute by the said Richard Harnett and myself, and made no objection thereto, and I say that Thomas Leahy and S. H. Butcher, from the times at which they respectively became the owners of the said mortgage of the 15th December, 1855, must have been well aware that the said Richard Chute had died long previously, and that no part of the said mortgage had been paid out of the assets, and that the said residuary estate had been distributed or segregated amongst, or for the parties entitled to it, and notwithstanding such knowledge, neither the said Henry Leahy, Francis Crawford, nor the plaintiffs Thomas Leahy, nor Samuel Henry Butcher, nor any persons or person on their, or any of their behalf, until immediately before the institution of this action, ever made any claim against the residuary estate or general assets of the said Richard Chute, deceased, for payment of the said mortgage debt of £3109, or the interest thereon, nor made any application to the said William Harnett, or to me, nor were they, or any of them, ever paid by either of us, as executors, out of the said assets of the said Richard Chute, any sums for or on account of principal or interest due on the said mortgage of the 15th December, 1855, save the proportion of the interest due up to the death of the said Richard Chute."

The first material question is whether the right to go against the personal estate is barred by the statute, inasmuch as no payment of interest was made out of it, nor any acknowledgment given by the executors in respect of it. As to this question, I am entirely in accord with the decision of the Master of the Rolls. The simple case is that a man effects a mortgage, covenants for payment, and by his will bequeaths his personal estate to legatees. The lands in the mortgage are the primary fund to pay the interest, and the mortgagee gets his interest regularly for a period within twelve years. Can it be said that devised lands and the personalty are discharged? What is the mortgagee to do? He gets his interest from the proper hand, the party liable to pay. Is he to sue the executor every year and get an acknowledgment? We are not even driven to rest on *Roddam* v. *Morley* (1) and *Pears* v. *Laing* (2), from which, I think, this case cannot in principle be distinguished. *Dibb* v. *Walker* (3) is on all fours with the present. There, on January 22, 1831, in certain indentures of transfer of mortgages then existing on an estate, Henry Walker, as owner of the equity of redemption, covenanted for payment of the mortgage debt. By a settlement, dated August 17, 1833, he settled the equity of redemption on his son's marriage, giving a life estate to the son, H. F. Walker, with remainder to the wife, Ellen Walker, for life, with divers remainders over. Henry Walker by his will, dated May 8, 1858, appointed the defendant and two others, one of whom disclaimed, and the other afterwards died, executors and trustees, and devised to them his real and personal estate upon trust for sale and conversion, and to pay his debts, and to pay the surplus to the defendant. Henry Walker died on January 19, 1860, and H. F. Walker died on November 11, 1866. The mortgages became vested in the plaintiffs by a deed of August 9, 1870, in which Ellen Walker joined and covenanted to pay the interest on the mortgages during her life. Pursuant to her covenant she paid the interest till her death in February, 1889. The estate was subsequently sold in a suit instituted by the plaintiffs as mortgagees, to enforce their security. The sale produced only £70,000, leaving a deficiency of £30,000 by reason of the fall in the value of land. To recover this deficiency the action of *Dibb* v. *Walker* (1) was instituted in May, 1891, by which it was sought to have the defendant declared liable to make good the same out of the estate of Henry Walker. The defendant pleaded the Statute of Limitations. It was obvious that if the payment of interest by Ellen Walker was effectual to keep the right of action alive as against the assets of the covenantor, the statute was no bar to the action. Two points were made for the defendant; the first point was special, turning on Ellen Walker's covenant in the transfer of 1870, and need not be considered in this case. But the second point is very material, being in fact one of the points argued before us, viz. whether payment of interest by a tenant for life of the equity of redemption is not sufficient to keep the right of action alive as against the assets of the covenantor. Dealing with this question, Mr. Justice Chitty said (at p. 435) :—"For the defendant, it is said that payment of interest by the tenant for life of the mortgaged lands is not sufficient to keep the right of action alive against the general assets of the mortgagor debtor by virtue of the covenant in the mortgage deed. This gives rise to the question, what is the relation of such a tenant for life to the debt? Undoubtedly, the hand of the tenant for life in possession of the mortgaged lands is the proper hand to make the payment of interest. That is peculiarly the case where, as here, the covenantor settles the mortgaged lands without reserving any interest to himself except his right to have recourse to the land in the event of his being called upon to pay. It may be admitted that such a tenant for life could not be sued in an action at law by the mortgagee. But in equity it is plain that the tenant for life could be sued by the mortgagee covenantee in a foreclosure suit, and that he is liable in such an action to be deprived of the rents and profits by the appointment of a receiver, if the interest be not kept down. He is liable, also, to the remainderman for default in payment of the interest, and also in such a case as the present, to the settlor, who has a

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(1) 1 De G. & J. 1. (2) L. R. 12 Eq. 52. (3) [1893] 2 Ch. 429.

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(1) [1893] 2 Ch. 429.

Appeal. 1895.
LEAHY v. DE MOLEYNS.
Walker, C.

right to have recourse to the estate as an indemnity against the interest of all persons liable by virtue of the indentures, whether at law or in equity, to pay the interest. Ellen Walker was primarily liable to make the payment. But this point appears to be covered by the principle of the decision in *Roddam* v. *Morley* (1), to the effect that such a payment sets free the action generally, and also by the case of *Forsyth* v. *Bristowe* (2). There, in an assignment of the equity of redemption by the mortgagor, the assignee covenanted to pay interest on the mortgage debt: no distinction for the purpose of the statute under consideration can be drawn between a covenant for payment of interest by an assign of the entire estate in the equity of redemption and a like covenant entered into by an assign taking merely a life estate in possession in the equity of redemption. This observation applies to Ellen Walker's covenant, and I think it is immaterial whether the covenant is entered into on the assignment or by a subsequent deed by way of further security to which the representative of the covenantor is party. The additional reason given by Lord Wensleydale in delivering the judgment of the Court in *Forsyth* v. *Bristow* (2) is not a mere *dictum*, but a ground of the decision itself. He lays it down that payment of interest by the assignee of the equity of redemption (which plainly includes tenant for life of the equity of redemption) is clearly payment of interest, and that the Statute 3 & 4 Will. 4, c. 42, s. 5, did not expressly require that it should be made by the party liable or his agent: and that if it implied it, the assignee of the equity of redemption who covenanted to pay is sufficiently an agent for that purpose. In regard to this doctrine of agency, it is to be observed that payment of interest by an agent is not expressly mentioned in the fifth section of the statute under consideration, but it appears to be imported from the other part of the section, which speaks of acknowledgment made by writing, by the party liable by virtue of the indenture or specialty, or his agent, and by the general tenor of the section, which treats payment of interest as an acknowledgment. In *Chinnery* v. *Evans* (3), Lord Westbury, speaks of the large import and meaning attributed to the words 'person by

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(1) 1 De G. & J. 1. (2) 8 Ex. 716. (3) 11 H. L. Cas. 115.

Appeal.
1895.
Leahy
v.
De Moleyns.
Walker, C.

whom the same shall be payable or his agent' which occur in the 40th section of the Statute 3 & 4 Will. 4, c. 27. Many other authorities were cited at the Bar: but I think it is unnecessary to consider them, and that I may rest my decision on the second point in *Forsyth* v. *Bristowe* (1) which has not been overruled or questioned." Accordingly the learned Judge held that the payment of interest by Ellen Walker was sufficient to keep the right of action alive against the defendant as the surviving devisee and executor of the covenantor.

Since this case was argued the case of *Steward* v. *England* (2) has been reported in the June number of the Law Reports, Chancery Division. In that case a testator, who had covenanted in a settlement made on the occasion of his son's marriage for payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life and had charged the said sum with interest upon certain land, by his will devised the land, subject to the charge, to his son in fee-simple. The money was never raised, nor any interest actually paid in respect of it, but the son entered into possession of the land, and for more than twelve years received the rents and profits. In this state of facts the question arose as to whether the personal estate of the testator could be held liable to make good the sum charged in the event of the land proving insufficient to enable the trustee of the settlement to realise the same, and it was held by Mr. Justice Kekewich, that the statute was a bar to the claim against the personal estate. In that case it must be observed that no payment was made. The devisee in fee was in receipt of the rents. He owed no duty to the personal estate of which he was tenant for life. No doubt the learned Judge hazards the opinion that if the devisee in fee had *paid* the interest it would not keep the action alive as against the personalty: but there was no payment: it was a case of mere continuance of possession by the devisee in fee and there was no relation to the personalty, duty or agency.

On this question therefore I think the statute affords no protection. We start then with the assumption that no bar under the

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(1) 8 Ex. 716.

(2) [1895] 2 Ch. 100.

Appeal.
1895.
LEAHY
v.
DE MOLEYNS.
Walker, C.

statute exists. It is settled that delay in a specialty creditor in not suing for a period less than that which creates a bar under the statute does not disentitle him to sue. As Jessel, M.R., says in *Re Baker* (1): "The debtor can always pay, and I cannot see how there is any negligence in the creditor in not suing, which is not greater negligence in the debtor in not paying." The same principle is to be found in *Re Birch* (2). There must be something more than mere delay: there must be some conduct, or act done leading to action on the part of the executor. If this were not so, Mr. Justice Chitty observes: "It would be compelling him to do that which would ordinarily be termed, if the case were inverted, a harsh course, a thing which I think ought to be avoided." How much more do these observations apply to a mortgagee who is getting his interest regularly from his mortgagor, the collateral fund being still liable, and the right to resort to it in the hypothesis kept alive! How does the executor suffer? If he lets the fund go to legatees it is his own fault. Turn now to the cases most strongly relied on by the defendants.

In *Ridgway* v. *Newstead* (3), the facts were as follows:—On December 8, 1838, Thomas Newstead, in consideration of a loan of £3000 mortgaged certain leasehold premises, with the buildings and machinery thereon, used as a brewery, to Joseph Ridgway, and covenanted in the usual way to pay the principal and interest at £5 per cent., thereby secured. The mortgagee predeceased the mortgagor. By his will which was proved in 1843, the mortgagor devised and bequeathed portion of his estate specifically amongst his children, giving to one son a life annuity and to one daughter a life interest in a sum of £2000, which after her decease was to go to her children, and naming two other children, his executors and residuary legatees and devisees. In 1857 the mortgagee's executors filed their bill against these two children claiming an account of what was then due on foot of the mortgage, asking that the premises comprised therein might be sold, and that if the proceeds of the sale should be insufficient to satisfy the mortgage debt, the deficiency should be made good out of the mortgagor's estate. The interest on the debt had been paid to the plaintiffs down to the year 1856, by the beneficial owner of the mortgaged property. It transpired that some portions of the estate had, in the interval between the death of the mortgagor and the institution of the suit, been set apart and appropriated to meet the claims of the annuitant and the persons entitled to the £2000. It was stated that the loss arose from the deterioration of the mortgaged property since the death of the mortgagor, and the Vice-Chancellor (Sir John Stuart), offered an inquiry as to the deterioration, but the inquiry was declined by the plaintiffs. The case recognized the principle that laches cannot be imputed to a mortgagee who receives payment of his interest, but decided that a special exception existed in favour of the annuitant and legatees of the £2000. It turned largely upon the special character of the mortgaged property, the high rate of interest receivable, and the election of the mortgagee's representatives, to rely on their security, though they were aware of its wasting nature. Their conduct thus altered the rights and position of the legatees, and therefore it was held that, though their legal claim against the unadministered assets remained, their equitable claim against the legatees was gone, and that the latter should not be asked to refund. In my opinion two propositions may be collected from this case, (1) that the mortgagee's right against the unadministered assets always remains good in law, short of the Statute of Limitations; but (2) that if the claim against the legatees be equitable, circumstances, coupled with lapse of time, may afford a bar to the equitable relief. "Although I cannot accede," says Lord Campbell, in giving judgment (1), "to the general rule contended for as to the effect of mere lapse of time, all circumstances remaining the same, I am of opinion that, in the present case, there are circumstances which, coupled with lapse of time, are a bar to the equitable relief prayed. I by no means say that, generally speaking, any laches can be imputed to a mortgagee who, during any period, however long, regularly receives payment of the interest of his mortgage money, if he quietly relies upon all the remedies which the law gives in respect of the mortgaged land, and of the personal liability of the mortgagor. But, in the present case, I think that there are circumstances to take it out of the common rule so far as the equitable claim against the legatees of the mortgagor is concerned."

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(1) 20 Ch. Div. 230.
(2) 27 Ch. Div. 622.
(3) 2 Giff. 492; and on appeal, 3 D. F. & J. 474.

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(1) 3 De G. F. & J. at p. 485.

The case of *Blake* v. *Gale* (1), was strongly relied upon by the added defendants. There the testator had executed a mortgage, dated August 30, 1843, by which he charged his equity of redemption in a freehold farm, in his own occupation, with a sum of £2400. He died in 1859, having, by his will, devised the farm to two of his sons upon trust for his children and issue, and directed that his unmarried daughters should be at liberty to carry on his farming business upon it, subject to a rent of £600, payable to the trustees. He gave his residuary personal estate, in the events which happened, equally among his six children, the above two sons (who were executors as well as trustees), and his four daughters. Shortly after the testator's death, the solicitors of the mortgagees made inquiry as to his affairs, and asked to whom they should apply for their interest. Thereupon the solicitor for the executors wrote a letter fully stating the condition of the assets and adding that the two unmarried daughters would probably carry on the farm for a time, and that their shares of the personal estate would afford them sufficient means to do so. This letter was acknowledged by the solicitors for the mortgagees who wrote back to say that they were very glad to hear that the unmarried daughters were able to continue at the farm with comfort as well as advantage. The two daughters carried on the farm till 1863, when one of them married, and the farm was then let by the trustees to her husband. The interest on the mortgage was paid by the unmarried daughters till 1863, and afterwards by the new tenant, who deducted it from the rent which he paid to the trustees. The interest was regularly paid till 1880, when the security which up to that time had been considered sufficient proved to be insufficient. The representative of the survivor of the mortgagees then brought an action against the executors and trustees of the testator alleging a *devastavit* by the executors in distributing the personal estate without providing for the mortgage debt, seeking to have the mortgaged property sold, and the deficiency, if any, made good by the executors personally to the extent of the personal estate distributed among the residuary legatees. Bacon, V.-C., held that the remedy for *devastavit* was barred, but made a decree for sale of the mortgaged property and for administration of the mortgagor's estate. Two of the executors being also residuary legatees, were treated as having in hand their shares of the residue, and a balance was found due from them which they paid into Court, but which was not sufficient to discharge the sum due upon the mortgage. The property included in the mortgage proved worthless, and the plaintiff thereupon commenced a new action against the other four residuary legatees, the daughters of the testator, for the amount of their shares of the residuary personal estate. The second action also came before Vice-Chancellor Bacon who dismissed it with costs. The plaintiff appealed, and in the Court of Appeal, Cotton, L.J., pointed out the remarkable nature of the case. He said (p. 577) :—" It was held in the previous action that the executors were not liable as on a *devastavit* for distributing the estate before this debt was paid, on the ground that the claim for *devastavit* was barred by six years, and when that action was commenced it was more than twenty years since the distribution. But the plaintiff contends that though the personal estate had been divided more than twenty years before the commencement of this action, and though he had lost his right as against the executors, he is entitled to recover from the defendants what they received out of the residuary personal estate." Having pointed out the singular nature of the questions raised by this contention, the learned Lord Justice refers to *Ridgway* v. *Newstead* (1), and says, " The present case is not at all like *Ridgway* v. *Newstead* (1) in its circumstances; but, in my opinion, that case lays down a principle applicable to the present, viz. that as the right of the creditors to follow assets which have been distributed without providing for their debt is a right only in equity, equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant that equitable relief to which under ordinary circumstances creditors are entitled. The

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(1) 32 Ch. D. 571.

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(1) 3 D. F. & J. 474.

Appeal. 1895. LEAHY v. DE MOLEYNS. Walker, C.

question here is—are the circumstances sufficient to prevent the plaintiff from obtaining relief? I do not go into the question of delay, because delay alone (as was said by Lord Campbell in *Ridgway* v. *Newstead* (1)) is not sufficient to prevent the creditor from asserting his right. There must be, to produce that effect, changes of position in the legatees during that period, or other circumstances which would make it inequitable to allow him to do so." Lord Justice Cotton then states that he did not base his judgment on any change of position in the legatees, and proceeds to examine the circumstances of the case. He referred to and read the letters which passed between the mortgagees' solicitor and the solicitors for the executors, and he says that the last letter written by the solicitor for the mortgagees "was really an assent on the part of the mortgagees to the division contemplated, and by the letter of the executors shown to be contemplated; and it must be remembered that this division would be to some extent for the benefit of the mortgagees, because the carrying on of the farm would prevent the deterioration of their security. There was an assent to the division and not only an assent to the division, but an assent to the division for the purpose, so far as necessary, of the money being expended in the cultivation of the farm. . . . In my opinion this assent to the division prevents the mortgagees from saying that the personal estate is still liable to them. It is an equitable release of the right, which they would otherwise have had, to fall back on the personal estate, if from any reason and under any circumstances their security became deficient. To allow creditors after such an assent to the distribution of the personal estate, to come after this lapse of time to recover the personal estate from the residuary legatees, would, in my opinion, be wrong, and contrary to what, under the circumstances, is just between the parties." And Lord Justice Bowen says (at p. 581), that for the purpose of deciding the question of the liability of the legatees, "we have to look at the delay which has taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is, that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that inference is to be drawn the claim will, for the purpose of quieting possession, be treated as abandoned . . . Each case must depend on its own circumstances. In this particular case it seems to me, that the rights of the parties are to be decided upon the ground that, as I read the facts, the mortgagees at the date of the distribution of the personal estate both knew what was going to be done in respect of the distribution and assented to it for their own interest. That amounts really to an equitable release or abandonment of their right of recourse against the personal estate, and it seems to me it would be wrong or impossible to allow a mortgagee who has consented to a distribution for his own interest in this way to come afterwards and say, that notwithstanding the distribution he should be allowed to follow the assets in the hands of the legatees."

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(1) 3 D. F. & J. 474.

The decisions in *Ridgway* v. *Newstead* (1), and in *Blake* v. *Gale* (2), turned on the special circumstances of each case; in the former the conduct of the mortgagees altered the rights and position of the legatees, in the latter the conduct of the mortgagees amounted to an equitable release of the personal estate in the hands of the legatees.

But in my opinion, there are here no such special circumstances or action or conduct. It is true a small portion of the security dropped on the death of the testator, but that was never treated as material, and as regards the legatees being permitted to acquire or retain habits of life and expenditure which would be interfered with by the establishment of a claim against the personal assets, that does not follow from any act of the plaintiffs other than not suing, while they were regularly paid by the natural fund. I do not think this can be treated as an alteration in the position of the legatees traceable to any action or inaction of the plaintiffs. Would not it have been strange if the plaintiffs had sued on the covenant while they were regularly paid their interest?

I will assume against the plaintiffs that they knew of the

(1) 3 D. F. & J. 474.

(2) 32 Ch. D. 571.

mortgagor's death, and that his life estate included in the security dropped. There is no evidence that the mortgagees knew of the dealing with the personal estate much less of their having assented to it; and I cannot see that the mortgagees should have imputed to them a knowledge that the executor would not properly apply and administer the personalty.

As regards the point under the Trustee Act, 1888, it is plain that the legatees are not persons claiming through a trustee within the meaning of section 8. The Master of the Rolls so held, and I agree with him and his reasons.

It was probably a legitimate consequence of the decision of the Master of the Rolls to hold that the devised lands were freed from the plaintiffs' claim, because the personalty could not be followed; but it is even plainer that if the personalty is liable the devised lands are also in their proper priority liable as assets.

The case seems to me to come round to this—There is no act done or representation made by the creditors which creates an equity against them; they took their interest from the natural and proper fund; persons who were their debtors received personalty, and were not asked to pay their demand out of it till now. There is no legal bar of the statute, and the question is, are the creditors or the debtors to suffer?

I should have been well satisfied if I could have found any special circumstances which would have enabled me to apply to this case the doctrine of *Blake* v. *Gale* (1) and *Ridgway* v. *Newstead* (2), but not finding such I think the plaintiffs are entitled to judgment for administration in the terms of the prayer of the amended claim.

FITZ GIBBON, and BARRY, L.JJ., concurred.

Solicitors for the plaintiffs: *Hardman & Sons.*

Solicitors for Edward De Moleyns: *Longfield, Kelly, & Armstrong.*

Solicitors for Francis B. Chute and Richard Chute: *M'Gillycuddy & Morphy.*

Solicitors for Thomas A. Chute: *Downing & Son.*

Solicitors for the other defendants: *Baker & Ringwood.*

G. Y. D.

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(1) 32 Ch. D. 571.

(2) 3 D. F. & J. 474.

MORE-SMYTH *v.* THE EARL OF MOUNTCASHELL.

House of Lords.
1896.
March 12.

Estate pur autre vie—*Special occupant—Executory agreement*—1 *Vict. c.* 26, *section* 6.

Appeal by the defendant from the decision of the Court of Appeal ([1895] 1 Ir. R. 63).

Levett, Q.C., and *Thomas Douglas*, for the appellant.

Warmington, Q. C., O'Connor, Q. C. (of the Irish Bar), and *Charles Church*, for the respondent.

The House of Lords (Lord Halsbury, L. C., and Lords Watson, Herschell, Macnaghten, Morris, and Davey) affirmed the decision of the Court of Appeal, and dismissed the appeal, with costs (1).

Solicitors for the appellant: *Pattinson & Brewer.*
Solicitors for the respondent: *Prior, Church, & Adams.*

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(1) See W. N., March 21st, 1896, p. 33; Law Times, Vol. C, p. 487.

Matrimonial.
1895.
Jan. 11.
Appeal.
Feb. 18.

HALLIGAN *v.* HALLIGAN.

Practice—Alimony—Increase of—Faculties of husband—Support of children by wife.

If the husband is relieved from the obligation of supporting his children by reason of the custody of the children being given to the wife, his faculties are thereby increased, and the Court can increase the permanent alimony already given to the wife.

Petition.

This was an application by way of petition for an increase of alimony by the petitioner in the suit on the ground of the increase of the husband's faculties, the custody of the children having been given to the wife by an order under the Guardianship of Infants' Act, 1886. The facts of the case and the arguments of counsel appear from the President's judgment.

O'Shaughnessy, Q.C., and *D. Kehoe*, in support of the application.

Gordon, Q.C., and *Herbert Wilson*, for the respondent.

The following authorities were referred to: *Cooke* v. *Cooke* (1); *Otway* v. *Otway* (2); *Saunders* v. *Saunders* (3); *Whieldon* v. *Whieldon* (4); *Cox* v. *Cox* (5); *Kempe* v. *Kempe* (6); *Mytton* v. *Mytton* (7); *Neil* v. *Neil* (8); *Louis* v. *Louis* (9); *Haigh* v. *Haigh* (10); *Milford* v. *Milford* (11); *In re Suffield and Watts* (12); *In re St. Nazaire Company* (13); *Thomasset* v. *Thomasset* (14); Pritchard on Divorce (2nd ed.), p. 14; Simpson on Infants, p. 171; also statute 49 & 50 Vict. c. 27.

(1) 2 Phill. 40.
(2) *Ibid.* 109.
(3) 1 S. & T. 72.
(4) 2 S. & T. 388.
(5) 3 Add. 276.
(6) 1 Hagg. 532.
(7) 3 Hagg. 655.
(8) 4 Hagg. 273.
(9) L. R. 1 P. & M. 230.
(10) *Ibid.* 709.
(11) *Ibid.* 715.
(12) 20 Q. B. D. 693.
(13) 12 Ch. D. 88.
(14) [1894] P. 295.

Matrimonial.
1895.
HALLIGAN
v.
HALLIGAN.

THE PRESIDENT:—

There are some elements of novelty in this case. The action was one for divorce *a mensa et thoro* by the wife, on the grounds of the cruelty and adultery of her husband. I may say of the case what Sir John Nicholl said, in one of the authorities which have been referred to:—"In this case the sentence already pronounced has decreed separation *a mensa et thoro*, at the wife's prayer, on account of the husband's cruelty and adultery; and certainly it is one of the grossest cases of misconduct that ever came under the notice of the Court"; and the cases show (1) that, in estimating permanent alimony, the conduct of the parties is one of the matters that may be taken into account. The Court having pronounced the usual decree, an application was made by the wife for permanent alimony in June last; and the Court fixed, upon the basis of an income of about £700, permanent alimony at the rate of £200 a year. It appeared that there were seven children. The moral obligation of supporting them rested upon the husband, and the Court took this into consideration. Some of them were living with the wife, perhaps by her voluntary act, and some were at school. This was a final order of the Court, and it was affirmed by the Court of Appeal.

Unquestionably, as was contended by counsel for the respondent, the law of the Court is (and there are some more recent cases on the subject than those which Mr. Gordon has cited) that a final order, once passed, cannot be re-heard. But there are exceptions (2) to the rule; and the General Orders of the Court, which have the same force as an Act of Parliament, expressly provide that "A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted, by reason of the increased faculties of the husband" (3). Therefore the Court is not embarrassed by the consideration that the order was, in a sense, final. The question really is whether there are increased faculties on the part of the husband?

Now, at the time the order was made, the full moral obligation rested upon the husband of maintaining his children. It is admitted that a father is under that moral obligation. It must also be conceded that he is not, and never was, under a legal obligation, except within the limits of the Poor Law Acts, or the criminal law, or in England under orders made pursuant to the provisions of the Divorce Act. But the question is, how far that moral obligation can be taken into consideration. The position of the case differs now, in my opinion, from the position it occupied when the order was made. I did take it into consideration. The residence of some of the children with the wife was then a voluntary act. The husband was bound, morally, to provide for the children; they ought to be fed, clothed, and educated by him. But since then an order has been made, under an Act of Parliament, by the Vice-Chancellor, giving the custody of the children to the wife. It appears to me that that order being in force, the husband is relieved from the obligation of supporting the children. In the case of *Mytton* v. *Mytton* (1), there were several children; and under the direction of the Court of Chancery, the children were placed with their mother. There was no order in that case—at that time there could be none—made for the maintenance of the children. The case came before the Court upon an application for alimony; and Sir John Nicholl says: "A husband who has such a fortune should make an ample allowance for his wife while living separately on account of his misconduct. The husband, it is stated, has voluntarily undertaken to pay to his wife £200 a year for the maintenance of the children. That arrangement, however, is not within the authority of this Court to enforce." It was a duty of imperfect obligation; it was a moral obligation, like that of the respondent up to the order of the Vice-Chancellor; but it could not be enforced. Sir John Nicholl continues: "I shall allot £1,000 a year permanent alimony, allowing the husband to deduct from that sum any payments exceeding £200 a year which he may actually make on account of pin-money. The wife will thus have the aid of the power of this Court for the payment of the whole £1,000, and in addition will have a collateral remedy to secure from her pin-money the payment of £200 a year for the children." That is, she provides for the children, being in her custody, and she does it by means of permanent alimony; and if the husband pays £200 a year for the maintenance of the children, it will be deducted. And so in this case, if the husband were to come forward and secure a maintenance for the children out of his income or faculties, I would say that he was not liable to an increased alimony. But as long as his income is free from this obligation, which he does not recognise, and which he does not offer to recognise, and which I have no means to enforce, I think his faculties have been increased by the order of the Vice-Chancellor. That moral obligation was taken into account in the case of *Kempe* v. *Kempe* (1). There Sir John Nicholl says: "Alimony at the rate of £250 per annum will not be too much, as Mrs. Kempe is, I apprehend, willing to take the child. If she declines to take it, the Court may be induced somewhat to lessen this sum; but if the refusal proceeds from the husband, if he will not allow his wife the comfort of retaining her infant, the Court, though it cannot control a father's rights, would not be disposed to hold such refusal as a ground for reducing the allowance. His conduct has been highly reprehensible; he is not a very fit person to bring up the child under the tuition of the partner in his guilt, a girl, too, of low condition, his servant before marriage; and it is due to the morals of society that a dissolute husband, who so offends, should contribute liberally to the support of an injured wife." There is another case in the same book, which has not been mentioned, *Harris* v. *Harris* (2), in which the Court says: "Taking the income of the husband at £250 per annum, and considering that he has two children to educate and maintain, and that he will have to pay the expenses of this suit upon both sides, I allot to the wife the sum of £75 per annum as alimony *pendente lite*."

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(1) See Browne on Divorce, 218. (2) See *Goodden* v. *Goodden*, [1891] P. 395.

(3) Order LXX., Rule 58.

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(1) 3 Hagg. 657.

These cases show that the Court will indirectly make provision for the support of the children by the wife, when the husband is relieved from that duty, inasmuch as his faculties are increased to the extent of that obligation from which he is relieved. Though he was under no legal obligation, he was under a moral obligation

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(1) 1 Hagg. 532. (2) 1 Hagg. 351.

Matrimonial. 1895. HALLIGAN *v.* HALLIGAN.

to support them. In the present case, inasmuch as the order of the Vice-Chancellor, taking the custody of the children from the respondent, has the effect of relieving him from that burden, I think this is a case in which the faculties of the husband have been increased, and that I have jurisdiction to make an order for increasing the alimony, which I do by awarding £150 a year additional alimony.

W. L.

Appeal. Feb. 18.

The husband appealed to the Court of Appeal (WALKER, C., PALLES, C.B., and FITZ GIBBON and BARRY, L.JJ.).

The Right Hon. J. Atkinson, Q.C., Gordon, Q.C., and *Herbert Wilson*, for the appellant:—

The appellant would be satisfied if the order provided that he should be at liberty to apply to the Judge of the Probate and Matrimonial Division for a reduction in the amount of alimony according as the children came of age; and also if it were shown that the increase made in the alimony was for the purpose of the maintenance of the children; otherwise the father might still remain liable to maintain the children: *Bazeley* v. *Forder* (1).

O'Shaughnessy, Q.C., and *D. Kehoe* :—

The respondent will undertake to pay out of the alimony for the maintenance and education of the children.

THE COURT thereupon made the following order :—

Upon motion of counsel, on behalf of the respondent, made unto the Court this day by way of appeal from the order of the President of the Probate and Matrimonial Division of the High Court of Justice in Ireland, made herein and dated the 11th day of January last, and on reading the notice of appeal, dated the 25th day of January last, and the said order, and on hearing what was alleged by the said counsel and by counsel for the petitioner, and the said petitioner, Mary Gertrude Halligan, undertaking to pay out of the alimony awarded her by the said order of the

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(1) L. R. 3 Q. B. 559.

Appeal.
1895.
Halligan
v.
Halligan.

Probate and Matrimonial Division, such sums as may be necessary for the maintenance and education of the children of the marriage residing with her, the custody of whom was given to the petitioner by the order of the Vice-Chancellor of Ireland, made in the matter of "Halligan, Infants, and the Guardianship of Infants Act, 1886," and dated the 24th day of July, 1894, it is ordered that the said order of the Probate and Matrimonial Division, dated the 11th day of January, 1895, be and the same is hereby affirmed, and that this appeal do stand dismissed with costs to be paid by the respondent, Nicholas Halligan to the petitioner, Mary Gertrude Halligan: And it is further ordered that the respondent be at liberty to apply to the Judge of the Probate and Matrimonial Division in respect of the said alimony from time to time as he may be advised.

Solicitors for the petitioner: *Brown & M'Cann.*
Solicitors for the respondent: *Hayes & Son.*

G. Y. D.

In re PENNEFATHER, Deceased.

SAVILE *v.* SAVILE.

(1895. No. 106.)

M. R.
1895.
Feb. 26.
March 26.

Will—Devise—Gift to children in priority—Sons to inherit before daughters—Estate tail—Estate for life.

A testatrix left and bequeathed "all the property whether in lands or otherwise" which she might die possessed of to trustees, their heirs and assigns, in trust (after a life estate to her mother who predeceased her)—"To the use of my nephew W. S. for his life use, and then to his children in priority in case he marries, the sons to inherit before the daughters; but in case the said W. S. my nephew should die unmarried, I leave and bequeath for the use of my cousin, M., her heirs and assigns for ever." The will was made in 1856. W. S. married in 1865, and had a son, J. S., and a daughter, B. The testatrix died in 1892, M. having predeceased her. Testatrix died possessed of real and personal estate.

Held, that W. S. took an estate for life in the real and personal estate of

M. R. 1895.

SAVILE *v.* SAVILE.

the testatrix, and that J. S. took an estate tail in the realty and an absolute interest in the personalty subject to the life estate of his father W. S.

Held, also that B was entitled to an estate tail in remainder in the real estate after the estate tail of J. S., with an ultimate remainder to the right heirs of the testatrix.

SUMMONS.

By her will, dated 25th March, 1856, Mary Pennefather provided as follows:—"I, Mary Pennefather, do hereby leave and bequeath all the property, whether in lands or otherwise, which I may die possessed of, to Edmund Staples, of Dunmore, and William Barker, their heirs and assigns, in trust for the uses hereinafter specified; first, to the use of my mother, Grace Galeazzi, for the term of her natural life, and after her decease to the use of my nephew, William Savile, for his life use, and then to his children, in priority, in case he marries, the sons to inherit before the daughters; but in case the said William Savile, my nephew, should die unmarried, I leave and bequeath, for the use of my cousin Mary, daughter of Edmund Staples, her heirs and assigns for ever."

The testatrix died 28th September, 1894, and letters of administration of her personal estate and effects, with her will annexed, were, on 31st January, 1895, granted to the plaintiff, William Savile, who was the plaintiff in the summons.

Edmund Staples and William Barker, both pre-deceased testatrix. Grace Galeazzi, the mother of testatrix, and Mary Staples, also both pre-deceased testatrix. The co-heirs at law of the testatrix, at her death, were her nephew, the plaintiff, William Savile, and the defendant, Stephen Moore, each of whom was a son of a sister of testatrix.

The plaintiff, William Savile, married in June, 1865, and had two children as issue of his marriage, viz. the defendant, John Savile, and the defendant, Beatrice Savile, both of whom had attained age in 1894.

The testatrix died possessed of both real and personal estate.

The questions submitted for the decision of the Court were as follows:—

1. Whether, upon the true construction of the devise and bequest contained in the will of said testatrix, the plaintiff William

Savile is entitled to an estate tail in the real estate of said testatrix, and to an absolute interest in the personal estate of said testatrix, or is only entitled to a life estate in said real and personal estate?

2. In the event of the Court being of opinion that the plaintiff is only entitled to a life estate, whether, upon the true construction of said will, the defendant John Savile is entitled to an estate tail in said real estate, and to an absolute interest in the personal estate of said testatrix in remainder, expectant on the determination of the life estate of said plaintiff in said real and personal estate, or is only entitled to a life estate therein in remainder?

3. Is the defendant Beatrice Savile entitled to any, and if so what, estate in said real and personal estate?

4. Has testatrix died intestate as to the ultimate remainder in the real and personal estate of the said testatrix?

Oulton, for the plaintiff:—

As to the real estate, the effect of the limitations in the will is to confer an estate tail on the plaintiff William Savile. The words, "to his children in priority," are equivalent to "to his children in priority of birth," and words importing succession, connected with the word "children," render the latter word a word of limitation: *Earl of Tyrone* v. *Marquis of Waterford* (1) and *Re Childe* (2) are authorities on this point. The fact that the devise to William Savile is expressly for life does not alter this construction: *Cleary's Trusts* (3); *Bowen* v. *Lewis* (4); *Jordan* v. *Adams* (5); *Robinson* v. *Robinson* (6); *Mellish* v. *Mellish* (7). The construction contended for is aided by the use of the word "inherit" in the sentence, "the sons to inherit before the daughters." This indicates that the sons should take through their father, rather than as purchasers. This construction is also supported by the gift over in case William Savile "should die unmarried."

(1) 1 D. F. & J. 613.

(2) W. N., 1883, p. 48; referred to in Jarman, 5th ed., p. 1242.

(3) 16 Ir. Ch. R. 438.

(4) 9 App. Cas. 890.

(5) 9 C. B. (N. S.) 483, 497.

(6) 1 Burr. 38.

(7) 2 B. & C. 520.

The personal estate devised by the will belongs to the plaintiff absolutely.

Shekleton, Q.C., for the defendant John Savile :—

Under the provisions of the will, the plaintiff takes an estate for life only in the realty, and the defendant John Savile is entitled to an estate tail. The devise to the children *prima facie* passes the fee, but the creation of successive estates shows an intention to create estates of inheritance, and the result is (as successive estates in fee are impossible) to limit successive estates tail to the children of the plaintiff in priority according to the order of birth. In this context the word "children" is a word of purchase and not of limitation: *Ginger* d. *White* v. *White* (1); *Lewis* d. *Ormond* v. *Waters* (2); *Kershaw* v. *Kershaw* (3); *Hennessey* v. *Bray* (4). When there is a devise to several in succession in words sufficient to pass the fee, or the whole interest of the testator in freeholds, the Court will, in order to give effect to the general intent, construe the gift as of successive estates tail: *Studdert* v. *Von Steiglitz* (5). In *Watkins* v. *Frederick* (6), Lord Westbury says, p. 366: "That the grandsons take estates tail follows, of necessity, from the direction that they shall take in succession one after another, 'the elder son to inherit before the younger,'" and that is strictly applicable to the present case. The general intention to be gathered from the will is to create estates of inheritance in the children of the plaintiff, and that general intention will be carried out as far as possible, viz.: by giving to the children successive estates tail. The general intention is to prevail: *Robinson* v. *Robinson* (7), *Cleary's Trusts* (8). The decision in *Jordan* v. *Adams* (9) does not apply to the present case, nor does *Palmer* v. *Palmer* (10).

The Earl of Tyrone v. *Marquis of Waterford* (11) is really an authority in our favour, for there the father and sons were treated as forming one class, and the words "in succession" referred equally to him and them. *Re Childe* (1) is distinguishable.

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(1) Willes' Reports, 348.
(2) 6 East, 336.
(3) 3 E. & B. 845.
(4) 33 Beav. 96.
(5) 23 L. R. Ir. 564.
(6) 11 H. L. Cas. 358.
(7) 1 Burr. 38.
(8) 16 Ir. Ch. Rep. 438.
(9) 9 C. B. (N. S.) 483.
(10) 16 L. R. I. 357; 18 L. R. I. 192.
(11) 1 D. F. & J. 613.

Consequently the defendant John Savile as the eldest and only son of the plaintiff is entitled to an estate tail in the real estate, and to the personal estate absolutely, subject to the life interest of his father the plaintiff in both the realty and the personalty.

Ball, for Beatrice Savile :—

The plaintiff William Savile takes an estate for life only. The children take by purchase. There are no words of limitation attached to the gifts to the children, and they take also life estates in succession, leaving the inheritance in the realty and the remainder in the personalty undisposed of. There is an intention to confer successive life estates on the children. And apart from question of intention the authorities are conclusive on the subject. *Foster* v. *Lord Romney* (2); *Purcell* v. *Purcell* (3); *Bevan* v. *White* (4); *Bridger* v. *Ramsey* (5); *Palmer* v. *Palmer* (6).

In *Robinson* v. *Robinson* (7) the circumstance of a "name and arms" clause was considered a material element in arriving at the decision; on this point see *Bevan* v. *White* (4) and *Studdert* v. *Von Steiglitz* (8). In *Hennessey* v. *Bray* (9) the question was as between an estate in fee and an estate in tail, the words used, unless cut down by implication, necessarily conferring an estate in fee. *Earl of Tyrone* v. *Marquis of Waterford* (10) is distinguishable. In *Kershaw* v. *Kershaw* (11) the general intention of the testatrix in favour of successive estates tail being given to the sons of James Kershaw (the younger) was plainly manifested.

Matheson, Q.C., for Stephen Moore :—

We adopt and support the contention put forward on behalf of the defendant Beatrice Savile that, on the construction of the will, the plaintiff and the defendants John and Beatrice Savile take life estates only in the real and personal estate. And Mary Staples having died in the lifetime of the testatrix, the ultimate remainder in the real and personal estate, expectant on the determination of the successive life estates, is undisposed of, the reversion in the real estate passing to the co-heirs of the testatrix, and the remainder in the personal estate to her next-of-kin.

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(1) W. N., 1883, 48.
(2) 11 East, 594.
(3) 2 Dr. & War. 219, note.
(4) 7 Ir. Eq. R. 473.
(5) 10 Ha. 320.
(6) 16 L. R. I. 357; 18 L. R. I. 192.
(7) 1 Burr. 38.
(8) 23 L. R. I. 564.
(9) 33 Beav. 96.
(10) 1 D. F. & J. 613.
(11) 3 E. & B. 845.

Oulton, in reply.

March 26.

THE MASTER OF THE ROLLS [after stating the facts, as already given, his Lordship continued] :—

I propose to deal with the case first as if the will were conversant with real estate alone. The first matter which strikes one in considering Miss Pennefather's will is that it is perfectly apparent that she intended to dispose of her whole property real and personal. No larger wording could be suggested than "all the property whether in lands or otherwise which I may die possessed of." That property she gives to her trustees, their heirs and assigns, in trust for uses which she thought exhausted it. That she has not provided for every possible event is undoubtedly the case. Had her nephew the plaintiff died unmarried either in her lifetime or after her death, without disentailing in the latter case, there would have been a total or partial intestacy in the events which have happened; for the plaintiff's counsel could not put his claim higher (at any rate) than to an estate tail in the lands. But while this is so, her intention was to dispose of all, and that intention must afford a clue to the elucidation of the provisions of the will. It was stated that the will is holograph, the composition probably as well as the penmanship of the testatrix herself. Now, what are the trusts she declares as to all her property whether in land or otherwise? We may pass by the life estate of her mother Grace Galeazzi who predeceased her; and come to the main and dominant provision of the whole will:—"To the use of my nephew William Savile for his life use; and then to his children in priority in case he marries, the sons to inherit before the daughters. But in case the said William Savile my nephew should die unmarried, I leave and bequeath for the use of my cousin Mary Staples, her heirs and assigns, for ever." Mary Staples also predeceased Miss Pennefather.

Now what estate did the testatrix intend the plaintiff William Savile to have? She says it, " For his life use." Of course that is not conclusive as to what estate he takes. It is, however, perfectly conclusive as to what he was meant to have, and is something to begin with. A gift in a will to a man and his issue, or to him for life and then to his issue, is effectuated by giving him an estate tail, in the latter case by applying the rule in *Shelley's Case* (1). So, a gift to a man and his children, or to him for life and then to his children, is similarly construed in cases where the word children is used as *nomen collectivum*, embracing descendants of whatever degree, and so equivalent to issue. This construction is usually placed upon the word in cases where at the date of the will there were no children of the first taker in existence, according to the rule in *Wild's Case* (2); and, in the first instance, it appears from the will itself that William Savile was not married at its date; and Mr. Gordon's affidavit states that he did not marry till 1865, nine years later. This then is the argument for the plaintiff who contends that "children" is to be used as *nomen collectivum*, that is, as a word of limitation; that he takes an estate in tail general; and that thus the testatrix's intentions are carried out, the children being provided for by the very nature of the estate itself which, unless destroyed by disentailing, must travel through all the branches of his family in the precise order in which the testatrix meant it to go. His counsel rely also on the words "in priority" as confirming this view, construing that word (I think correctly) as equivalent to "in succession," in order of seniority.

For the defendant it is contended that the word children is not in this context a word of limitation but a word of purchase; that the children take estates tail in remainder, the father being only tenant for life, and that the estate is thus in fact put into strict settlement. But as this construction, while putting the estate out of the possession of the father, would enable the defendant his eldest son to bar the remainders with the consent of the father as protector, or when he himself succeeds, Mr. Ball for Beatrice Savile, and Mr. Matheson for Stephen Moore, while arguing that William Savile takes an estate for life and no more, and that the children take by purchase, here part company with the defendant John Savile, contending that as there are no words of limitation attached to the gifts to children, these take successively for life only, leaving the inheritance undisposed of.

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(1) 1 Rep. 93 *b*.

(2) 6 Rep. 16 *b*.

This latter view I can by no means adopt. I find no trace of an intention to confer life estates on the children; and the will is of course under the Act, 7 Wm. 4 & 1 Vict. c. 26. I have no doubt that it would be doing less violence to the intentions of Miss Pennefather to hold that she meant to confer successive estates in fee simple (thus of course destroying all but the first) than to insert the words "for life," thus leaving her intestate as to the bulk of her property. She knew how to give a life estate and she knew how to limit the fee. It is impossible to read this will as dealing merely with life interests. The gift over is in the event of William Savile dying unmarried, which is an accurate way of expressing her intention; but probably she looked upon it that if married he would have descendants as a matter of course. A lawyer would have told her that he might marry and have no children or that he might survive all his descendants, in which case the gift over would be inoperative and other provisions should be made. This was not done. But the intention is to my mind clear that the gift over was not one to take effect in remainder after definite estates, but only on the extinction of the descendants of William Savile.

Apart from intention, however, Mr. Ball contended that the case was closed by authority. He relied on *Foster* v. *Lord Romney* (1); *Purcell* v. *Purcell* (2); *Bevan* v. *White* (3); *Bridger* v. *Ramsey* (4); and *Palmer* v. *Palmer* (5).

Foster v. *Lord Romney* (1) was of course before the Wills Act, and turned mainly on the word *such* ("for default of *such* issue"), following a gift to the "son and sons of Thomas severally and successively one after another in priority of birth," &c. The

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(1) 11 East, 594.

(2) 2 Dr. & War. 219, note.

(3) 7 Ir. Eq. R. 473.

(4) 10 Ha. 320.

(5) 16 L. R. I. 357; 18 L. R. I. [192.

King's Bench held and certified to Chancery that there was nothing to enlarge the gift to sons into an estate tail, the gift over being in default of *such* issue, *i.e.* sons, from which no implication arose. Lord Ellenborough said: "There was not only no necessary implication, as there must be to warrant giving to the sons of the nephews a larger estate than for life, but it did not appear that there was even a probable intention in the testator that they should take larger estates."

To exactly the same effect is *Purcell* v. *Purcell* (1), turning upon the same words "in default of *such* issue."

In *Bevan* v. *White* (2) very similar language occurred, with the addition of the words "in succession" to the mention of the sons ("first and every other son in succession"); and following *Foster* v. *Romney* (3), the words in default of *such* issue were thereby interpreted as meaning in default of *sons*, and so there was no estate of inheritance, but only life estates. That was almost certainly a will before the Act.

In *Bridger* v. *Ramsey* (4) the language is the same, "in default of such issue," pointing at sons as *personæ designatæ*. There, as in several of the other cases mentioned, the gift was of my "estate," a word sufficient to pass the fee under the old law without words of limitation; but this circumstance was not sufficient to rebut the inference arising from the gift over in default of "such issue" on the death of specified persons who took an estate thus necessarily limited to a life estate. None of these cases has the slightest bearing upon one in which those words, or words in the remotest way resembling them, do not occur. It is impossible not to see that if the word "such" had been absent in these cases the decision would have been different.

In *Palmer* v. *Palmer* (5) in the Court below, and on appeal (6), that point did not arise. There were no words to raise an implication of an estate tail (by a gift over in default of issue or the like), and the will was before the Wills Act.

The gift there was of a life estate to the testator's son John, with remainder after his decease "to his first and every other son lawfully to be begotten, according to seniority of age and priority of birth," remainder to Thomas Palmer for life, with remainder to his first and every other son, according to seniority of age and priority of birth, and their heirs. The case came before the Exchequer Division, and was discussed first on the question as to the construction of the will, and secondly as to the question of the reception of certain evidence at the trial. The matter was argued before Baron Dowse and Mr. Justice Andrews. The latter either gave no judgment, or if he did it is not reported. On the point of construction of the will Baron Dowse says: "The decision in this case principally depends upon the construction of the will of John Palmer. This will, which was made in 1797, with an affectation of technicality, is one of the most confused and blundering documents it has ever been my misfortune to have to construe. The devise with which we have to deal is that of the lands of Grange, held under a lease for lives renewable for ever. The evident intention of the testator was, as far as in him lay, to keep the lands in the line of the male issue of his son John. John, on his death, was succeeded by his son Francis, and Francis by Richard, upon whose death without male issue, the plaintiff contended, the property devolved on the plaintiff. The testator had a daughter, to whom he made a bequest of personal estate, which is no farther material than that some of the words of the bequest to the daughter were used to support the plaintiff's view of what he alleged to be the true construction of the will. The defendant represents the daughter of Francis, and to support her claim as against the plaintiff contends that the words of the will gave an estate in fee or in tail general to Francis. The plaintiff, on the other hand, contends that the words of the will gave an estate in tail male to John's sons in succession; that the plaintiff, as present tenant in tail, is entitled to the land, to the exclusion of all the female issue of John's sons. I am of opinion that the testator intended to create successive estates in John's sons, and that, consistent with the rules of law as applied to the words of this will, the nearest point to which I can go in the direction of the testator's apparent intentions is to give John's sons successive estates for life. If I am wrong in this, the only other construction, I think, that could be adopted is that contended for by the plaintiff. It is said that there is a devise in this will of another estate, which has been held by the present Master of the Rolls to give an estate in tail male to the devisee. Even assuming that this decision of the Master of the Rolls was made under such circumstances as binds this Court, the words of the devise are different from the present, and cannot be much help to us in considering the question now before us. [His Lordship then referred to the devise to John and his sons.] From these various limitations I can come to no other conclusion than that the present plaintiff was entitled to a life estate in the lands."

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(1) 2 Dr. & War. 219, note.
(2) 7 Ir. Eq. R. 473.
(3) 11 East, 594.
(4) 10 Ha. 320.
(5) 16 L. R. Ir. 357.
(6) 18 L. R. Ir. 192.

The decision of the Exchequer came before the Court of Appeal, but went off on the question of evidence as regards which they differed from the Court below. The question of the construction of the will did not, therefore, become material. Lord Ashbourne says, "It is not necessary for us to go into the question on the construction of the will"; but he was rather of opinion that the sons of John took successive life estates only. Sir Michael Morris says, "As to the construction of the will, if I had to give an opinion, I should come to the same conclusion as the Court below, particularly having regard to the authority of *Bevan* v. *White* (1), viz. that the plaintiff is entitled to a life estate. But the person to argue the question of an estate tail is not here." Barry, L. J., says, "As to the construction of the will, I express no opinion, for while I entertain the greatest deference for any decision of Sir Edward Sugden on such a point, I am always anxious, if I can, to carry out a testator's intentions; and in the present instance I do not think the testator intended each of his sons to take only a life estate, leaving his issue unprovided for." And Naish, L.J., says that he concurred with the other members of the Court that the estates were not estates in fee nor in tail male. But really the Court abstained from deciding the question of construction, and even if it had been decided by the Court of Appeal, the words of the will are different from those of that before me, and no inference can be drawn from that decision to aid me in deciding the present case. The will there in question was made before the Wills Act.

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(1) 7 Ir. Eq. R. 473.

I am therefore very clearly of opinion that none of these cases rules the present; that the idea of successive estates for life merely is wholly inadmissible; and that it would be much more reasonable to hold, if we were driven to it, that the testatrix, in attempting to create successive estates in fee simple, had frustrated her intentions, save as to the first. I do not think, however, that we are driven to that. This is a will made since the Act. The devise, in general terms comprising lands, would *prima facie* pass the entire estate, *i.e.* the fee, "unless a contrary intention should appear by the will" (sect. 28). The creation of successive estates does indicate a contrary intention; but does it necessarily indicate an intention to create only successive life estates? I think, clearly and manifestly not. The intention is plain to create some estate or estates of inheritance; and successive estates tail correspond exactly with the object in view. The question is, why should they not be deemed to have been meant?

Jordan v. *Adams* (1) has no resemblance to this case. The words there were, "heirs male of his body," and the Exchequer Chamber was equally divided in opinion whether these words were words of limitation or of purchase.

Bowen v. *Lewis* (2) was cited for the proposition that the rule in *Shelley's Case* (3) applies where the gift subsequent to the life estate of the first taker is to his child, or children, and that in such a context the existence of an express estate for life makes no difference. No one denies that. That case was twice argued before the House of Lords, and at the end of the second argument, the judgment of the Court of Appeal was affirmed by three Lords against two. There were no such words as "in priority," which occur here. Lord Cairns says, "I take it to be also quite clear that the word 'child,' or 'children,' is *prima facie* a designation of a person or persons in the first degree of descent: but at the same time it may be used as a *nomen collectivum*: popularly it is so used. There are many cases in which we speak of the children of a family, or the children of a person, meaning to denote not issue of the first generation but issue generally. I take it to be also clear, as clear as anything can be in law, that the words,

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(1) 9 C. B. (N. S.) 483. (2) 9 App. Cas. 890. (3) 1 Rep. 93 *b*.

'dying without issue,' before the new Wills Act, are words pointing to a general failure of issue, and not a failure of issue at a particular time; I take it also to be clear, upon the authorities, that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially, and to have their explanation from the gift to the particular individuals that you have had before." And if the case is considered there is almost equal weight in the observations of the two learned lords who dissented. The words there used are, however, different from those of the present case.

The case of *The Earl of Tyrone* v. *Marquis of Waterford* (1), is a curious instance of the same result being arrived at upon different grounds by learned judges of the highest eminence. The words of the will were, "I leave my . . . property to my brother, Lord John Beresford, and to his children in succession." The Court of Appeal, consisting of Lord Campbell, C., and Knight Bruce and Turner, L.JJ., all held that Lord John Beresford took an estate tail. Lord Campbell says, p. 624, "The law would not permit Lord John Beresford, and his four sons, each to take a fee simple in succession; but to carry his intention into effect, Lord John himself may take an estate tail; and in my opinion, this is the true construction of the will," and he draws special attention to the fact that there are no words indicating that Lord John was to take merely for life (p. 625). The Lord Chancellor's judgment proceeds largely on the meaning to be assigned to the words, "in succession," which he takes from Dr. Johnson—"A series of persons following one another; a lineage; an order of descendants." He leaves the question open, whether "children" is there a word of limitation or a word of purchase; and also, as being immaterial, whether the sons took estates tail in remainder.

Lord Justice Knight Bruce says, "The language of the will does not, in my opinion, authorise us to hold that any one of the four sons is made by it a tenant in tail, whether in possession or in remainder." The language to which he there refers is the words, "in succession," which he thinks plainly to apply to the children *inter se* alone, and not to refer to the parent.

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(1) 1 D. F. & J. 613.

He decides the case on the ground that children is a word of limitation, in connexion with the words, "in succession," notwithstanding the fact that the four sons of Lord John were *in esse* at the date of the will, and that, in other parts of it, "children" is undoubtedly used in its ordinary sense.

Lord Justice Turner, on the other hand, held that, as the word "property" is sufficient to designate the fee, even supposing that "children" is a word of purchase, Lord John and his sons must be supposed to take identical estates in succession, since there is no indication that he is to take for life only. Coming first in the "succession" therefore he took the first estate in tail.

Now in *Earl of Tyrone* v. *Marquis of Waterford* (1) stress is laid by two of the three learned Judges on the absence of anything to suggest a life estate in the first taker. In the view taken by Knight Bruce, L.J., this is immaterial; for if children be a word of limitation, Lord John would take an estate tail whether he had or had not an express life estate.

Earl of Tyrone v. *Marquis of Waterford* (1), therefore, is in this respect certainly dissimilar to the case before me, even if the words "in priority" are to be construed in the way in which the Court of Appeal construed the words "in succession."

The case on which Mr. Oulton mainly relied as ruling the present in his favour is in *Re Childe* (2). It is not elsewhere reported, and of course in the Weekly Notes the report is most meagre.

It is as follows: "A testator after leaving all his personal and real estate in trust continued as follows:—'After the above mentioned wish has, if possible, been carried out, I leave all my personal and real estate to my nearest male relative (provided he is not mentally incapable) and then to his eldest and other sons in succession, then to my right heirs in the event of male issue failing.' *Held*, that the plaintiff as the nearest male relative, took an estate tail male in possession in the realty. *Earl of Tyrone* v. *Marquis of Waterford* (1) discussed."

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(1) 1 D. F. & J. 61.

(2) 1 W. N., 1883, p. 48.

Now *Re Childe* (1) has in my opinion little bearing on the present case. The nearest male relative takes no estate for life, or if the gift to him and then to his eldest and other sons in succession could be deemed to mean that he is to take for life only, the gift over "in the event of male issue failing" confers upon him most clearly an estate in tail male by implication, and explains the sense in which the words "the eldest and other sons in succession" are to be understood, sons being, as in *Robinson* v. *Robinson* (2), *nomen collectivum* by force of the context.

Thus none of the cases compels me to hold, by force of direct decision, that the expressed intention of giving a life use must be frustrated and the property placed at the disposal of the first taker. Apart from decision, then, is the word children here a word of limitation or a word of purchase? As used in this will, I think it is the latter. It is used as the general term for sons and daughters, as the testatrix says in almost so many words. No stress can be laid upon the word *inherit* as indicating that the children are to take by descent: for that word is constantly used as equivalent to *succeed to.* Indeed Lord Westbury says, in *Watkins* v. *Frederick* (3). "And here I would advert to the argument on the words 'to inherit,' which I think are used by the testator as equivalent simply to the verb 'to take.' But if more is required, then certainly the words 'to inherit' are fully satisfied by holding them to mean, to take an estate of inheritance, which estate must be an estate tail in order that the clear direction that they shall take in succession may be effectuated." There are other passages in *Watkins* v. *Frederick* (3) which go to support the defendant's case in reference to the last point.

Earl of Tyrone v. *Marquis of Waterford* (4) is, when rightly understood, an authority not for the plaintiff but for the defendant. Two of the Judges who decided it held, or went on the assumption, that the father and sons formed one class, who took estates tail in succession, because the father had no life estate, and the words "in succession" referred to him and them equally. But in this case no such interpretation is possible because the father takes an express life estate and it is the children alone who take in priority. Thus they (*i. e.* the children) take on the principle of *Earl of Tyrone* v. *Marquis of Waterford* (1) successive estates tail; and there is nothing in that case to suggest that the plaintiff in the present case should have more than a life estate. The terms of the gift over, the use of the words "in priority," the word "inherit," as explained by Lord Westbury in the passage I have read from *Watkins* v. *Frederick* (2), and above all, the plain and manifest intention that as long as there were descendants of the plaintiff they should all be provided for, leave no doubt on my mind that the children take successive estates tail if they take as purchasers; and the life estate to the father, with the use of the words "sons and daughters" as explanatory of "children" shows that they do take as purchasers. I may add that I entirely agree with the Vice-Chancellor, in what he said in *Studdert* v. *Von Steiglitz* (3) that "where there is a devise to several in succession, in words sufficient to pass the fee or the whole interest of the testator in freeholds, the Court will, in order to give effect to the general intent, construe the gift as of successive estates in tail."

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(1) 1 W. N., 1883, p. 48.

(2) 1 Burr. 38.

(3) 11 H. L. Cas. at p. 366.

(4) 1 D. F. & J. 613.

On the whole, I am of opinion that there is nothing in this will, as there was in *Bowen* v. *Lewis* (4) to enlarge the estate of the first taker to an estate tail; and of course no such question arises here as was met in *Parker* v. *Tootal* (5) where it was held that the first taker had a life estate, with remainder to his first and other sons successively in tail, with remainder to himself in tail, by force of the words "in default of such issue," which do not occur here. Apart from the distinction caused by that phrase, *Parker* v. *Tootal* (5) has a bearing on this case in favour of the defendant's contention.

I am therefore clearly of opinion that the plaintiff is only entitled to an estate for life in the real estate, with remainder, expectant on the determination of the life estate of the plaintiff, to the defendant John Savile in tail, with remainder to Beatrice

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(1) 1 D. F. & J. 613.
(2) 11 H. L. Cas. at p. 366.
(3) 23 L. R. Ir. at p. 581.
(4) 9 App. Cas. 890.
(5) 11 H. L. Cas. 143.

Savile in tail, and with an ultimate remainder to the testatrix's right heirs.

As regards the personal estate the same rule must prevail so far as the life interest of the plaintiff is concerned; and it has not been argued that there is anything in this case to exclude the general rule that under such circumstances the absolute interest, subject to the life estate of the plaintiff, belongs to the first tenant in tail of the real estate.

Solicitors for plaintiff: *Gordon & Son.*
Solicitors for John Savile: *H. Lefroy Stein.*
Solicitors for Beatrice Savile: *Hayes & Son.*
Solicitor for Stephen Moore: *A. St. George.*

R. W. L.

In re PORTSTEWART TRAMWAY CO.; Ex parte ROBERT O'NEILL.

M. R.
1896.
Jan. 28.

Winding-up—Tramway Company—Mortgage—Judgment creditor—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 199*—Statutory remedy.*

The Court has jurisdiction, under sect. 199 of the Companies Act, 1862, to make an order to wind up a Tramway Company consisting of more than seven members, incorporated by Order in Council pursuant to the Tramway (Ireland) Acts. Where the Order in Council, after giving borrowing powers, expressly provided that mortgagees might enforce payment by the appointment of a receiver:—

Held, that this did not preclude a mortgagee who had obtained judgment against the Company from obtaining a winding-up order.

Petition.

This was an application by Robert O'Neill under sect. 199 of the Companies Act, 1862, for an order to wind up the Portstewart Tramway Company. The Company was incorporated under an Order in Council, dated 26th April, 1880, pursuant to the Tramway (Ireland) Acts, for the purpose of making a tramway from the Portstewart railway station to the town of Portstewart, in the Co. of Londonderry. The capital of the Company was stated in the said Order as 1000 shares of £5 each, and by the said Order the Company was empowered to borrow on mortgage a sum not exceeding £1666 on the terms therein mentioned. The Company duly issued two mortgages under the seal of the Company, one for the sum of £700 to John O'Neill, and the other for the sum of £966 to the Belfast and Northern Counties Railway Company.

The petitioner was the surviving executor of the said John O'Neill, deceased. The mortgages provided for payment of interest on the said sums at the rate of 5 per cent. per annum, and that the principal should not be called in or repaid without three months' notice on either side. The Company duly paid interest on the mortgages up to the 7th November, 1891, but after that date they made default in payment thereof. Notice to call in the principal sum of £700 was duly served on the 1st September, 1892.

By the Order in Council it was provided that the mortgagees of the Company might enforce the payment of the arrears of interest, or the arrears of principal and interest due on their mortgages, by the appointment of a receiver.

The petitioner, with his co-executor Henry O'Neill, since deceased, brought an action in the Chancery Division of the High Court to have it declared that they were entitled to payment of the sum of £700 and interest, and to have a receiver appointed over the undertaking, and a receiver was duly appointed over the said undertaking, and on the 19th July, 1894, an order was made, declaring that the said mortgage was well charged on the said undertaking. The amount of the earnings of the Company was insufficient to pay off the said mortgages, and as the rolling-stock was becoming depreciated the petitioner believed that it would be impossible to obtain any portion of the said principal, and submitted that it was just and equitable that the Company should be wound up by the Court.

The petition was duly served on the Company, but they did not appear.

Denis S. Henry, for the petitioner :—

The Court has jurisdiction, under sect. 199 of the Companies Acts, 1862, to make an order to wind up a Tramway Company: *Re Brentford and Isleworth Tramways Company* (1), where Bacon,

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(1) 26 Ch. D. 527.

V.-C., held that an unregistered Tramway Company, incorporated by a special Act, did not fall within the exception of "existing Companies incorporated by Act of Parliament," in section 199 of the Companies Act, 1862, and that it might therefore be wound up under that section. That case was followed by Stirling, J., in *Re Borough of Portsmouth* (*Kingston, Fratton, and Southsea*) *Tramways Company* (1), where it was decided that the fact that a debenture holder had obtained the appointment of a receiver, as here, did not deprive him of his right, as an ordinary creditor, to present a winding-up order, and that he was entitled to the order. [He also referred to *Hope* v. *Croydon and Norwood Tramways Company* (2); *Re Barton-upon-Humber and District Water Company* (3); *Bartlett* v. *West Metropolitan Tramways Company* (4); *Re Ennis and West Clare Railway Company* (5); 23 & 24 Vict. c. 152, sections 1, 17, 28, 40, 46.]

John Stanley, Q. C., for the Belfast and Northern Counties Railway Company.

THE MASTER OF THE ROLLS :—

No distinction has been pointed out between the position of this Tramway Company and that of the Tramway Companies in the English cases to which I have been referred.

The decision of Bacon, V.-C., in *The Brentford and Isleworth Tramway Company* (6), as reported, contains a very short note of the judgment; but it has been followed in later cases in England. Acting upon these cases, I am of opinion that I have jurisdiction to make an order to wind up this Company under the Companies Acts.

Mr. Henry's client is an incumbrancer and a judgment creditor of the Company, and comes within the decision in *The Portsmouth Tramway Case* (1), and therefore he has the *status* of a person who is entitled to apply for a winding-up order, unless he is precluded from so doing by sections 5 and 6 of the Order in Council, under which this Company was incorporated. Sect. 5

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(1) [1892] 2 Ch. 362.

(2) 34 Ch. D. 730.

(3) 42 Ch. D. 585.

(4) [1893] 3 Ch. 437.

(5) 3 L. R. Ir. 94.

(6) 26 Ch. D. 527.

M. R.
1896.
In re PORTSTEWART TRAM CO.; *Ex parte* O'NEILL.

of that Order empowered the Company to borrow on mortgage or bond to the extent of £1666. Sect. 6 provides that "the mortgagees of the Company may enforce the payment of the arrears of interest, or the arrears of principal and interest, due on their respective mortgages, by the appointment of a receiver."

If a new right is conferred by an Act of Parliament, and a statutory remedy attached to it, the general rule is that the remedy is exclusive; but if the right given by the Act of Parliament is not a new one it does not prevent the exercise of other remedies. I am of opinion that the right conferred on the mortgagees by section 6 of the Order in Council is not a new one. The right to a receiver is one recognised remedy for a judgment creditor, but it is only one. Therefore the remedy given to a judgment creditor of a Company to obtain a winding-up order is not precluded by the terms of the Order in Council. The only question that remains is whether the applicant is entitled to the order under sect. 199 of the Companies Act, 1862. Mr. Henry contended that the words of that section should be read as "any Company (except Railway Companies incorporated by Act of Parliament consisting of more than seven members, and not registered under this Act), may be wound up," &c. But the grammatical and obvious meaning of the section is that the power to wind up is confined to Companies, whether Railway Companies or others, having more than seven members, and that when a Company consists of less than seven members the ordinary law of partnership applies and the winding-up machinery does not. In the present case the Tramway Company has not appeared to oppose the application to wind up, although the application has been adjourned more than once, and I must therefore assume that the Company has no legal objection to the order asked for. On the production of an affidavit showing that there are more than seven members of the Company, I will make an order to wind up the Company, and direct the usual reference to Chambers.

Solicitor for the petitioner: *D. Mac Laughlin.*

Solicitors for the Belfast and Northern Counties Railway: *Torrens, Sons, & Bristow.*

W. L.

In the GOODS of WHITE.

Probate.
1895.
May 6, 13.

Will—Probate—Words following signature of testator and attestation clause duly executed—Appointment of executors—Incorporation by reference.

The will of a testator commenced as follows:—"I give, devise, and bequeath to my trustees and executors hereinafter named all my property whatsoever and wheresoever situate, on trust." The will was signed by testator, and his signature was followed by a regular attestation clause, duly signed by two witnesses. Below the signature and attestation clause were these words:—"I find on reading the above, previous to the execution thereof, that I omitted to name my trustees and executors. I hereby appoint my son and my friend L. my executors and trustees."

It was proved that the words below the signature were written by testator prior to the execution of the will:—

Held, that the added words could not be included in probate of the will.

Motion.

Thomas J. White of 4, Usher's-quay, Dublin, made his last will dated 18th December, 1886, which commenced as follows:—"I give, devise, and bequeath to my trustees and executors hereinafter named all my property of every kind and description whatsoever and wheresoever situate, on trust." The trusts were then set out, and the will was signed by the testator, and his signature was followed by a regular attestation clause duly signed by two witnesses. Below the signature and attestation clause there were these words:—"I find on reading the above previous to the execution thereof that I omitted to name my trustees and executors. I hereby appoint my son and my friend Loftus Walshe my executors and trustees."

The testator died 19th March, 1895. Application was made to the Assistant Registrar to permit the words added at the end of the will, whereby the testator named his executors and trustees, to be included in the probate, but he declined to do so without an order of the Court. An application was accordingly made to the President of the Probate and Matrimonial Division on 6th May, 1895, on behalf of Mr. John White and Mr. Loftus Walshe for a grant

Probate.
1895.
In re
WHITE.

of probate to them as executors, and that probate should be granted of the will, including the words added after the signature of the testator and the attestation clause.

Evidence on affidavit was given to show that the entire of the will including the writing below the signatures and addresses of the witnesses (except such signatures and addresses) was in the handwriting of the testator, and that the added words were written before the execution of the will. The affidavit of the applicant Mr. John White stated the circumstances of the making of the will. It also stated that the testator had told him that he was going to appoint him one of his executors, and asked him who he would like to act along with him, and gave him to understand that he would appoint Mr. Loftus Walshe as the other executor.

Price, Q.C., in support of the application :—

The Goods of Greenwood (1) is very like this case, except that there there was an asterisk before the words written below the attestation clause and an asterisk before the word "executor" wherever it occurred in the will. *The Goods of Birt* (2) is an authority for the admission to probate of words written after the attestation clause provided they are shown to have been written before the will was executed. In this case there is sufficient evidence on that point. In *White's Case* (3) there was no proof that the added words were written before execution, and on that ground they were rejected. In *The Goods of Jones* (4) the witnesses to the will were unable to say whether the addition in question was there at the time of the execution of the will; and see the observations of Sir J. P. Wilde in *The Goods of Kimpton* (5) as to the principle to be adopted.

The distinction between *The Goods of Dallow* (6) and this case is that here there is a devise and bequest to trustees and executors, while there they were only referred to in a direction as regards something to be done by them.

(1) [1892] P. 7.
(2) L. R. 2 P. & D. 214.
(3) 6 Jur. (N. S.) 808.
(4) 1 Notes of Cases, 396.
(5) 3 Sw. & Tr. 427.
(6) L. R. 1 P. & D. 189

Probate.
1895.
In re WHITE.
May 13.

[Counsel also cited *Re Raghtigan* (1); *Re Arthur* (2); *Re Puddephatt* (3); *Re Dearle* (4).]

THE PRESIDENT :—

In this case the testator made a will which commenced thus :—"I give, devise, and bequeath to my trustees hereinafter named all my property of every kind and description whatsoever and wheresoever situate on trust." This will was signed by the testator, and his signature was followed by a regular attestation clause duly signed by two witnesses. Then followed below the signature and attestation clause these words :—"I find on reading the above previous to the execution thereof that I omitted to name my trustees and executors; I hereby appoint my son and my friend Loftus Walshe my executors and trustees."

The Registrar declined to admit to probate the added words, and the Court was moved to overrule the decision of the Registrar, and Mr. Price argued the case, if I may presume to say so, extremely well.

Lord St. Leonard's Act expressly declares that no signature of a testator shall be operative to give effect to any disposition which is underneath. But Mr. Price relied upon two classes of cases as avoiding this enactment.

First, cases in which the matter underneath the signature was treated as an interlineation, such as *Re Birt* (5); *Re Greenwood* (6), in which following *Re White* (7), words written underneath the signature were connected by physical marks with words written above the signature, and held to be interlineations in connection with these words, and argued that those in *White's Case* (7) were rejected because not proved to have been written before execution, and in *Birt's* (5) and *Greenwood's Cases* (6) admitted to probate on evidence of their having been written before execution.

Now the words in question were written before execution, but there are no grounds on which they can be introduced or connected as an interlineation.

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(1) 26 Ir. L. T. R. 93.
(2) L. R. 2 P. & D. 273.
(3) *Ibid.* 97.
(4) 39 L. T. (N. S.) 93.
(5) L. R. 2 P. & D. 214.
(6) [1892] P. 7.
(7) 6 Jur. (N. S.) 808.

The second class of cases are those in which unexecuted or unattested papers have been incorporated with regular testamentary papers and so admitted to proof.

I find no authority for the application of this doctrine to the present case. *Re Dallow* (1) seems undistinguishable, and though decided in 1866 has I believe never been questioned. In *Dallow's Case* (1) the alleged words of reference were "my executors as hereinafter named," and the clause underneath the testator's signature was:—"My executors are W. A. Dallow, Cleobury Mortimer, and my brother John Dallow." Here the words are:—"My trustees and executors hereinafter-named," and the clause is, "I find on reading the above previous to the execution thereof that I omitted to name my trustees and executors. I hereby appoint my son and my friend Loftus Walshe my executors and trustees."

The substance of each case is the naming the executors. The express gift to the executors does not affect the principle. The appointment of an executor is itself a gift of the personal estate. I should hesitate to dissent from *Dallow's Case* (1), even if I did not approve of it, and I am happy to know that in the present case the matter is of slight importance as a trust never fails for failure of a trustee.

Solicitor for applicants: *John White.*

R. W. L.

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(1) L. R. 1 P. & D. 189.

In re MAHON'S ESTATE (1).

Land Judge's Court.

1895.

Nov. 15.

Vendor and vendee—Petition—Tenant for life—Settled Land Act, 1882—*Landed Estates Court Act, sect.* 47.

A tenant for life who has entered into a contract for sale of the fee-simple under the Settled Land Acts, 1882–1890, is entitled to present a petition for sale as a vendor under the 47th section of the Landed Estates Court Act.

W. M. Jellett moved the petition in this case, which was presented by a tenant for life as vendor, in order to carry out a contract for sale of the fee-simple which he had entered into. The petition was queried in the office.

Madden, J.:—

The question in this case is whether a tenant for life, who has entered into a contract for sale of the fee-simple under the Settled Land Act, can present a petition for sale as a vendor under the 47th section of the Landed Estates Court Act. This is the first petition of this kind that has been presented since the passing of the Settled Land Act, 1882, and I desired that it should be moved by counsel in Court.

I have no doubt that a tenant for life, exercising his statutory power of sale under the Settled Land Act, is a vendor within the meaning of the Landed Estates Court Act. The positions of a tenant for life, in relation to this Court, under the Settled Estates Act, and Settled Land Act, are altogether different. The Settled Estates Act, 1877, which conferred upon this Court the powers of the Court of Chancery in relation to leases or sales of settled estates under the provisions of the Act, was passed at a time when a tenant for life could convey only such title as he had—that is to say, his life estate. If it were desired to convey the fee, the statutory powers of the Court had to be invoked. But

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(1) This and the three following cases were heard by Madden, J., sitting for the Land Judge.

Land Judge's Court. 1895. *In re* MAHON'S ESTATE.

the position was totally changed when, by the Settled Land Act, the tenant for life became entitled to sell the fee. This Court has power under the 47th section of the Landed Estates Court Act to carry out sales as between vendor and purchaser. It was not, in my opinion, necessary to enact that a tenant for life, selling under the Settled Land Act, should be considered a vendor within the meaning of the Landed Estates Court Act. The words of the 47th section are wide enough to include all vendors, whether selling by virtue of their estate, or under a statutory power, and I shall, therefore, fiat the petition.

Solicitors for the petitioner: *St. George & Browne.*

W. G.

Land Judge's Court. 1895. Nov. 12, 13, 20.

IN THE MATTER OF THE ESTATE OF LADY CATHERINE DE BURGHO, OWNER; THE SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY, PETITIONERS.

Judgment inter partes—*Privies in estate—Estoppel—Question of public interest—Several fishery in non-tidal waters—Evidence—Admissibility.*

A judgment *inter partes* is an estoppel against privies in estate only where the estate has been acquired by the person sought to be estopped subsequently to the date of the judgment. The conversion of an existing renewable leasehold into a fee-farm grant is not the acquisition of a new estate for this purpose.

A claim by an individual to a several fishery in non-tidal waters is not a question of public interest on which a judgment which does not work an estoppel is admissible against strangers.

A title to a several fishery may be sufficiently established by user to justify its sale under the provisions of the Landed Estates Court Act.

OBJECTION by John Sampson Rich to the final notice to tenants and adjoining owners disputing the title of the owner to a several fishery in the river Shannon, which was included in the order for sale.

The facts of the case, material for the purpose of this report, are fully stated in the portion of the judgment of Mr. Justice Madden, reported *infra*, p. 276.

Price, *Q.C.*, *Matheson*, *Q.C.*, and *Brady*, for the petitioners:—

This case comes within the principle laid down by the Court of Appeal in Chancery in *In re Acheson's Estate* (1). There Christian, L.J., says at p. 135:—"Each case will be governed by its own circumstances, and I can conceive one in which the dispute might be so far cleared up by successive actions or even by user, *longa continua et pacifica*, as that the Estates Court might safely undertake what remained to be done. But this is no such case." The title is fully set out in the report of the case of *Dwyer* v. *Rich* (2). As to cases in which the Landed Estates Court have refused to make a declaration of title without a trial at law, see *Netterville's Estate* (3); *Carson's Estate* (4).

The proceedings in *Dwyer* v. *Corbett* are an estoppel. At all events they are coercive evidence against the objector. [Counsel commented on the evidence as to user.]

The Solicitor-General (*Kenny*, *Q.C.*), *Bushe*, *Q.C.*, and *D. F. Browne*, for Colonel Rich the objector:—

Rich is not bound by the proceedings in *Dwyer* v. *Corbett*; Stephens' Dig. Art. 44, sub-sect. (2); Taylor, sect. 624; *Neill* v. *Devonshire* (5); *Hemphill* v. *M'Kenna* (6). *Dwyer* v. *Corbett* was a private litigation between two individuals, and the judgment in it is not admissible against Rich.

Matheson, *Q.C.*, in reply:—

The leases from Dwyer terminated simultaneously, and he would have been entitled to possession, except that his predecessors had agreed to grant a lease for lives renewable for ever. He had the legal title, bound by an equitable obligation to grant a lease to O'Grady. Dwyer was a trustee, and his possession was the possession of his *cestui que* trusts. The decree in Chancery was before the second trial of the action against Corbett. The case, therefore, comes within the principle of actions between

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(1) Ir. R. 3 Eq. 105.

(2) Ir. R. 4 C. L. 424; 6 C. L. 144.

(3) Ir. R. 3 Eq. 504.

(4) Ir. R. 4 Eq. 555.

(5) 8 App. Cas. 135, *per* Lord Blackburn, at p. 185.

(6) 8 Ir. L. R. 43, *per* Crampton, J., at p. 51.

Land Judge's Court. 1895.

In re De Burgho's Estate.

privies. If Dwyer had recovered the fishery, he would have been bound to convey to O'Grady. Dwyer had the legal estate in the lands when he contested our rights. Verdicts are admissible as acts of ownership, and as proving possession. Corbett could only defend, what would otherwise be a trespass, by showing that there was a several fishery. Supposing the case never went to trial, the filing of a defence would be evidence. Anything done after the license, anything done in defence of the right, is admissible. In *Devonshire* v. *Neill* (1) the proceedings in *Lord Cork* v. *Villiers*, which were between private persons, were admitted. The Lord Chief Baron admitted these as evidence of possession.

Nov. 20.

Madden, J.:—

This case comes before the Court upon objection to the final notice to tenants and adjoining owners. It raises the question of the petitioner's right to sell a certain several fishery in the river Shannon, included in his mortgage, but now claimed by the objector as owner of the bed and soil of the portion of the river in respect of which the fishery is claimed. A several fishery, as the words are now understood, means an exclusive right to fish in a given place, either with or without the property in the soil. Here the right sought to be sold is of the latter class, for the objector is seised of the property in the soil of the *locus in quo* for an estate of fee-farm in possession, under two conveyances dated the 24th November, 1887, and 22nd March, 1888. My attention has been called to the omission of all reference to the fishery in the conveyance which deals with the substantial portions of the *locus in quo*. This omission, taken in connection with the express mention of the fishery in the other deed (which deals mainly with the portion of the lands of Stradbally unaffected by the petitioner's claim), is not without significance in view of the history of the case. Inasmuch, however, as the objector has acquired under this conveyance the property in the bed and soil of the river, *usque ad medium filum aquæ*, I think he is entitled to rely on the presumption thus raised of title to the right of fishing over his own property. He is unable to fortify this presumption by any evidence that either he or his predecessors in title ever exercised, or claimed to exercise, any right of fishing in this part of the river (with the exception which I shall notice hereafter) although they have always fished the portion of the river adjoining the rest of their estate. This abstention is the more remarkable inasmuch as the owners in this matter and their predecessors in title have since the year 1815, asserted their title to a several fishery in this portion of the river, and have fished it by themselves, their tenants and licensees for a period which goes back to the year 1815 at latest. The exception to which I have referred was in the year 1875 when two fishermen named Heffernan fished this portion of the river for a short time in the month of April by the direction of the late Col. Rich, under whom the objector claims. It appears from the evidence that they were driven off *vi et armis* by the servants of the owner, and that neither they nor their master took any legal proceedings in assertion of any claim of right.

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(1) 8 App. Cas. 135.

The objector's counsel cannot dispute this state of facts. They endeavour to explain it away; they say that the respective rights of the public and of riparian owners in a navigable river where the tide does not ebb and flow were not clearly defined or generally understood until the decision of the Court of Common Pleas in *Murphy* v. *Ryan* (1) (recently followed in *Smith* v. *Andrews* (2) in the year 1868); that the fishing before that date deposed to in the affidavits may have been by members of the public in exercise of a supposed common of piscary; that Col. Rich did proceed to assert his right as riparian owner in 1875; that he was then advanced in years, and that after his death in 1880 his estate was the subject of proceedings in the Court of Chancery. They urge that inasmuch as the present objector is seised of the bed and soil of the river *usque ad medium filum*, and has therefore, presumably, the right of fishing to the same extent, the Court ought not, in this state of facts, finally to conclude against the presumption so raised by conveying to a purchaser without the finding of a jury upon the title of the owner to a several fishery; and accordingly they ask me either to exclude the fishery in dispute from the order for sale, or to direct an issue.

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(1) Ir. R. 2 C. L. 143.

(2) [1891] 2 Ch. 678.

The presumption of law upon which the objector relies is founded on the doctrine thus stated by Lord Hale, De Jure Maris, Pars I., chap. 1, "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing *usque ad filum aquæ;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side." This presumption certainly assumes its weakest form when it is divorced from actual exercise of right, and when the title deed to the principal portion of the *locus in quo* differs from the conveyance of the adjoining land by ignoring the right which the other carefully conveys. But still I hold that the presumption arises even under this deed, and I am of opinion that the objector is entitled to put the petitioner upon proof of the owner's title to a several fishery in the *locus in quo.*

The evidence tendered on the part of the petitioners divides itself into two classes. First, an uninterrupted series of acts of ownership from the year 1815 to the present time, upon which they rely as establishing a title by prescription to a several fishery, appurtenant to the adjoining lands, or as affording evidence from which a lost grant might be presumed. Secondly, they offer in evidence the judgment on proceedings in an action of *Dwyer* v. *Corbett* in the Queen's Bench, by which they contend that the objector is estopped from denying the owner's title to the several fishery in question.

I begin with the latter contention, for if it is well-founded there is an end of the objector's case. *Dwyer* v. *Corbett* was an action brought against Corbett, the licensee of Sir Richard De Burgho the predecessor in title of the owner, by one Dwyer, who was then in possession of the bed and soil of the disputed part of the river. It was an action of trespass, in which the defendant justified under the title of his licensor to a several fishery, and it unquestionably involved the exact point now in dispute. It was twice tried at the Limerick Assizes. The first verdict, in 1861, was set aside, and a new trial ordered, which was had at the Spring Assizes of 1862. At both trials the jury found for the defendant, establishing as against Dwyer the right of Sir Richard De Burgho to a several fishery. If I had come to the conclusion that the judgment in this action was evidence against the objector, it would be necessary for me to consider the pleadings and findings in detail, in order to deal with an argument which has been addressed to me on the part of the objector, based upon the findings of the jury upon certain of the issues. But does the judgment in this action estop the objector Rich, or is it admissible in evidence against him?

To answer this question it is necessary to examine the respective titles under which he and Dwyer held the lands in question. The title is fully set forth in the report of an action of *Dwyer* v. *Rich* (1), to be found at I. R. 4 C. L. 424, and I. R. 6 C. L. 144, to which both sides have referred. It appears that one John Napper, who was seised in fee of certain lands, including the *locus in quo*, demised them by lease dated the 31st July, 1750, for a term of years, which expired in 1860, to Thomas Allen, whose representatives sub-demised to Robert Hunt in 1775. In 1800 the reversion in fee, expectant on the termination of the lease of 1750, was vested in John Dwyer, who in that year agreed to let the lands to Robert Hunt, then in possession under the sub-lease, for lives renewable for ever. In 1860, when the lease of 1750 expired, the interests in the sub-lease of 1775, and in the agreement of 1800, were vested in Thomas William Grady. The fee-simple was vested in Dwyer, afterwards the plaintiff in the action of trespass. Dwyer brought an action of ejectment for recovery of possession of the lands, ignoring the agreement of 1800. Thereupon Grady filed a bill in Chancery for specific performance of the agreement, and according to the practice then in force gave a consent for judgment, and obtained an injunction restraining Dwyer from issuing execution on his judgment. Dwyer, however, treated the bed of the river now in dispute as not included in the lease of 1775, or in the agreement of 1800, issued his *habere*, and obtained possession from the sheriff. It was when he was in such possession that he brought his action of trespass against the licensee of the De Burgho family, with the result already mentioned.

I now proceed to examine the title of the objector, in order to ascertain whether he is privy in estate to Dwyer, and estopped by the judgment. Thomas William Grady, having acquired the interests under the sub-lease of 1775, and the agreement of 1800, demised the lands for lives renewable for ever, by lease dated the 12th April, 1806, to John Meade Thomas, who conveyed his interest, by deed dated the 15th April, 1823, to John Sampson Rich, the father of the objector, under whom he claims. As the result of the Chancery proceedings, two indentures of fee-farm grant were executed under the provisions of the Renewable Leasehold Conversion Act, in respect of the agreement of 1800 and the lease of 1806. Ultimately it was decided in *Dwyer* v. *Rich* (1) that the bed and soil of the river at the place in dispute was comprised in these demises. It follows as the result of this litigation that Dwyer was not lawfully seised of an estate in fee-simple in possession when he brought his action of trespass in 1861, but that the fee was bound by outstanding leases for lives renewable for ever, under one of which John Sampson Rich was entitled, as against Dwyer, to possession of the *locus in quo* for an interest converted into the fee.

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(1) Ir. R. 4 C. L. 424; Ir. R. 6 C. L. 144.

According to the clear principles of the law of estoppel it is necessary, in order to estop the objector, to show that he derives title under Dwyer by act or operation of law subsequent to the recovery of the judgment. If this is shown it is reasonable that he should be estopped, because his estate was represented at the time of the recovery of the judgment, though not in his person. But the objector's title is derived under the lease of 1806, which was itself carved out of the agreement of 1800. It is said that by virtue of the execution subsequent to the judgment of the two indentures of fee-farm grant, the grantees under these deeds became privies in estate to Dwyer. I am not prepared to extend the doctrine of estoppel to such a case. The objector here holds the fee by virtue of his lease for lives renewable for ever, and of a statute operating *in invitum*, by which Dwyer was compelled to convert the pre-existing interest into one of a different tenure. He does not, in my opinion, become a privy in estate by virtue of the conversion of his interest.

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(1) Ir. R. 4 C. L. 424; Ir. R. 6 C. L. 144.

It is further contended that even if the objector is not estopped by the judgment in *Dwyer* v. *Corbett*, it is admissible in evidence against him, upon the question of possession and user by the owners and their predecessors in title. I cannot adopt this view of the law. No doubt where ancient possession is in dispute, exceptions have been admitted to the rule excluding hearsay evidence, or evidence of reputation. In the language of Lord Blackburn in *Neill* v. *Duke of Devonshire* (1): — "Where the question is one of public interest, which the question whether the public were entitled to fish in a tidal river or were excluded from it, clearly is, evidence of reputation is admissible. The evidence afforded by a record showing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts and the usage at that time were as then pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is admissible, at least in cases where reputation would be admissible." There are distinct and intelligible grounds upon which an adjudication against one member of the public is admissible in a litigation affecting certain rights of the public generally, similar to those which formed the subject-matter of the adjudication. But here the right asserted is a private right. There is no question of ancient possession in which the public are interested. If Rich is privy in estate to Dwyer he is estopped. But short of estoppel, I see no principle upon which the judgment in an action in which a private right was established against Dwyer is admissible in evidence against Rich, whose ancestor was really claiming adversely to Dwyer at the time of its recovery.

[His Lordship having examined the evidence apart from the judgment in *Dwyer* v. *Corbett*, stated that he was of opinion, on the evidence, that the petitioner had shown title to sell the fishery, as comprised in their mortgage, and continued :—]

If any facts were seriously in dispute, or if the objector or his predecessors in title had at any time been in actual enjoyment of the fishery, I should not have decided the case upon affidavits.

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(1) 8 App. Cas. at 186.

But the owner's positive case appears to me to be so strong, and the objector's presumptive case so weak, that I do not consider it necessary to submit the question at issue to a jury. Each case, as Christian, L. J., observed in *In re Acheson* (1), must be governed by its own circumstances. The present case seems to range within the class instanced by the Lord Justice where a dispute as to a several fishery might be so far cleared up "even by user, *longa continua et pacifica*, as that the Estates Court might safely undertake what remained to be done." Here I can find no substantial dispute save that with Corbett, and if I am to regard it, I must have regard also to its issue. The user is long and continuous, and the only interruption to its pacific character seems to tell more strongly against the objector's case than if the Heffernans had never disturbed the peaceful possession of the owners and their predecessors in title.

Price, Q.C., asked for a direction to the Taxing Master to allow the attendance of counsel to hear judgment. He said that he was informed that such a direction was necessary in all cases of interlocutory proceedings.

Madden, J., said that no such practice had existed when he was at the bar, and that he would not throw any doubt upon the propriety of the allowance of fees to counsel on hearing judgment in a case like the present by giving any special direction. If the Taxing Master disallowed such fees, the matter could be brought before the Court for decision.

Solicitors for the petitioners: *Whitney & Moore.*
Solicitor for the objector: *Connolly.*

W. G.

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(1) Ir. R. 3 Eq. at p. 135.

In re O'LEARY'S ESTATE.

Land Judge's Court.
1895.
Nov. 20.

Legacy duty—Legacy in satisfaction of debt—Evidence.

A statement in a will that a legacy is bequeathed in satisfaction of a debt is sufficient *prima facie* evidence of the testator's indebtedness to exempt the legacy from duty.

Claim by the Commissioners of Inland Revenue for legacy duty in respect of a legacy bequeathed to the personal representatives of Horatio T. Jude by a codicil to the will of John Enright, and expressed to be given in satisfaction of a debt due by the testator to Mr. Jude. Except for the statement in the will there was no evidence forthcoming as to whether there was in fact any debt.

C. Mac Dermot, for the Inland Revenue.

Cuming, for the representatives of Mr. Jude, cited Hanson on Succession Duties (3rd ed.), 61; *Williamson* v. *Naylor* (1).

Madden, J.:—

In this case a sum of £40 has been retained at the instance of the Commissioners of Inland Revenue to meet a claim for legacy duty on a sum of money disposed of by a codicil to the will of John Enright. The only evidence in the case is supplied by the statements in this codicil, from which it appears that the testator was at one time in the employment of Mr. Jude, who kept a tavern in this city, in the capacity of clerk and cellarman, and that while he was so employed he received and appropriated to his own use certain sums of money amounting in all to £300, the property of Mr. Jude, for which he never accounted. Having enjoyed during his lifetime the use of this money, apparently without compunction, it occurred to him on his deathbed that it would be only

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(1) 3 Y. & C. 208.

Land Judge's Court. 1895. *In re* O'LEARY'S ESTATE.

right that his defalcations should be made good by those upon whom his property was about to devolve, and accordingly for the purpose of making what he calls restitution he directed that (subject to certain charges) this sum should be paid to the representatives of Jude. The question is whether they are to be treated as creditors or legatees. If creditors, they are entitled to be paid the full sum without deduction. If legatees, duty must be paid. Outside the codicil there is no evidence of the existence of a debt. During the argument I was impressed by the consideration that opportunities for fraud might arise if it were open to a testator by statement or recital in his will to convert what would otherwise be a legacy, liable to duty, into satisfaction of a pre-existing debt; and I desired to look into the authorities in order to ascertain whether any rule had been laid down dealing with cases of this kind. I can find no such rule. For myself, I should be unwilling, even if I had the power, to add to the number of artificial rules of evidence by which Courts are prevented from getting at the reality of each individual case. I therefore deal with this codicil as I should with any other writing under the hand of Enright containing an admission of a debt. It does not, in my opinion, lose its character of an admission because it is testamentary in form, and because the debt is expressed to be satisfied by a legacy. If Enright had directed his debts to be paid "including a sum of £300 now in my hands, the property of Horatio Jude," the effect would be the same, and it would be hard to contend that the estate of the testator would not be bound by his admission so made. I am therefore of opinion that the codicil is admissible as evidence of an antecedent debt. If it be evidence at all, I regard it as evidence upon which I ought to act in the case before me, for I see no reason to disbelieve Enright's account of his relations with his employer.

Solicitor for the Inland Revenue: *R. O'B. Furlong.*

Solicitor for Mr. Jude's representatives: *J. Noble.*

W. G.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF THE REDEMPTION OF RENT (IRELAND) ACT, 1891; AND OF MARY ANNE KEOGH, GRANTOR, AND ANDREW JOSEPH KETTLE, GRANTEE.

Land Judge's Court.
1895.
Nov. 6, 22.
Dec. 3, 10.

Local Registration of Title (Ireland) Act, 1891, *sect.* 22—*Redemption of Rent (Ireland) Act,* 1891, *sect.* 1—*Redemption of fee-farm rent.*

The Redemption of Rent (Ireland) Act, 1891, is a "Purchase of Land (Ireland) Act" within the meaning of sect. 22 of the Local Registration of Title (Ireland) Act, 1891, and the redemption of a fee-farm rent is a sale of "land" within the meaning of the same statute.

QUESTION of law referred to the Court by the Central Registering authority under section 14, sub-sect. 2 of the Local Registration of Title (Ireland) Act, 1891.

Andrew Joseph Kettle was tenant in fee-farm under a fee-farm grant dated the 1st April, 1867, made between Darby Keogh of the one part and Elizabeth Connolly of the other part, under the provisions of the Renewable Leasehold Conversion Act, at the yearly fee-farm rent of £40 1*s.* 9*d.* He applied under section 1 of the Redemption of Rent (Ireland) Act, 1891, to redeem this rent, and Mary Anne Keogh who was then grantor within the meaning of the Act, signified her consent pursuant to the section in the prescribed time and manner. The proceedings in the matter were carried out under the Land Purchase (Ireland) Acts, and finally by a vesting and charging order dated the 28th March, 1895. This was entitled "In the matter of the Redemption of Rent (Ireland) Act, 1891," and it was thereby ordered by the Irish Land Commission pursuant to the power vested in them by that Act and the Land Purchase (Ireland) Acts, 1870 to 1891, that that part of the lands of Kilmore Big in the occupation of the grantee under the said fee-farm grant should vest in the grantee in fee-simple subject to and charged with the repayment to the said Commission of the sum of £760 advanced by them to

Land Judge's Court. 1895.

In re KEOGH, *Grantor.* KETTLE, *Grantee:*

the said grantee for the redemption of the said perpetual yearly rent by an annuity of £30 12*s.* 10*d.* for the term of five years, and thenceforth the same or such reduced or other annuity as might be substituted therefor. In order that Kettle might be registered under the Local Registration of Title (Ireland) Act, 1891, as owner of the said lands, the Land Commission transmitted a duplicate of the vesting order for registration. The Registrar declined to register the grantee as owner, on the ground that the case did not come within the 22nd section of the Local Registration of Title (Ireland) Act, stating as his grounds, first, because as indicated by the title of the vesting order the transaction is really and substantially based on the Redemption of Rent (Ireland) Act, 1891, which is not one of the Purchase of Land (Ireland) Acts supplying the procedure only; second, because as the subject-matter of the agreement was rent which is not land (see section 95 of Registration Act) it cannot be maintained that any land was sold and conveyed to or vested in anyone under the Purchase of Land (Ireland) Acts or otherwise howsoever; third, because the land being already vested in the grantee the order of the Land Commission was inoperative in so far as it purported to vest such land in the person already seised; fourth, because as that which the order purported to vest in the purchaser was the land itself, *i.e.* the interest to which he was previously entitled, it is not possible to hold that the interest vested in him by the order can be deemed a graft on his previous interest in the lands, and thus section 29 of the Act cannot be brought into operation; fifth, because under the circumstances the result of the compulsory registration would be to give an indefeasible title to a portion of land the title to which had never been examined at all, a result contrary both to the spirit of the Act and the system which it embodies."

Meredith, Q.C., and *M'Carthy Mahony*, for the grantee (1):—

The Redemption of Rent Act is one of the Purchase of Land

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(1) When the case first came before the Court (Nov. 6), the arguments were principally directed to the first of the Registrar's objections, which was supposed to be the main question for decision. At the suggestion of the learned Judge the case was re-argued on objection No. 2.

Acts within the meaning of section 22 of the Registration of Title Act: see the definition of those Acts contained in section 95 of the latter statute, which after enumerating the various Acts on the subject from 1869 to 1889, contains the addition "and any Act amending any of the said Acts." The Redemption of Rent Act is such an amending Act, it amends and extends the Land Law (Ireland) Act, 1887. It could not be contended that the Purchase of Land (Ireland) Act, 1891, is not a Purchase of Land Act within section 22, and it is not specially mentioned in section 95 of the Registration of Title Act. The three Acts were passed on the same day, and both the Purchase of Land Act and the Redemption of Rent Act amend the previous Acts.

Further, even if the Redemption of Rent Act were not a Purchase of Land Act, the consent to the redemption of the rent had the same effect (see section 1) as the lodgment of an agreement to purchase under the Land Purchase Acts, and the proceedings have the like consequences; and one of those consequences is the registration of the ownership under the Registration of Title Act. The words in section 1, "in like manner as if it were a head-rent redeemed under section 16 of the Land Law (Ireland) Act, 1887," relate to the amount and application of the money advanced. If the grantor had not consented to the redemption the grantee would have been held to be a tenant of a present tenancy, and would have been entitled to have a fair rent fixed (section 1, Redemption of Rent Act), and the objection of the conversion of a freehold estate into a chattel interest would equally apply.

Further, the *land* has been sold and vested in the purchaser within the meaning of section 22. Notwithstanding its title the Redemption of Rent Act really deals with the sale of land. This Act applies only to cases where the relation of landlord and tenant exists: *Kelly* v. *Rattey* (1). It is the last of a series of statutes dealing with purchase by tenants, and throughout the entire code the subject-matter of the purchase is the holding: see Landlord and Tenant Act (Ireland), 1870, sect. 44; and "holding" means the land itself; see Land Law (Ireland) Act, 1881, section 57; and the judgment of Barry, L.J., in *Kelly* v. *Rattey* (1): see also *Adams* v. *Alexander* (2). The proceedings were properly carried

(1) 32 L. R. Ir. 445; [1894] 2 Ir. R. 226, note. (2) [1895] 2 Ir. R. 363.

out by vesting order, and there is no force in the objection that the grantee had already a fee-farm estate in the land. The Purchase of Land (Ireland) Act, 1885, is an Act (see title) to provide greater facilities for the sale of land to occupying tenants in Ireland, and section 2 commences:—" For enabling tenants to purchase their holdings either from the Land Commission or from the landlords of such holdings"; and section 26 provides that the expression "tenant," shall include a tenant holding under a fee-farm grant. The Act therefore enables a fee-farm grantee to purchase, and a fee-farm grantor to sell, the holding, *i.e.* the parcel of land. Section 8 enables the Land Commission to carry out such sale by an order vesting the holding in the grantee; and all sales are now so carried out unless there is an order to the contrary: Rule II., 15 Aug. 1891. If therefore in the present case the proceedings had been commenced by the lodgment of an agrement to purchase under the Acts of 1881 and 1885 instead of by an originating notice under the Redemption of Rent Act, they would have been carried out by an order such as has been now made, vesting the land in the grantee; and all the objections now raised would have equally applied, but nevertheless the ownership of the land should have been registered under section 22. Section 8 also provides that every vesting order purporting to vest a holding in a purchaser is to be binding on all persons.

To further show that it is the holding and not the rent which is the subject-matter of the purchase, and which is vested in the purchaser—section 9 of the Purchase of Land Act, 1885, enables the Land Commission to declare by their order that the sale of the holding is made subject to an annuity charged upon the holding in favour of the Land Commission. The subject-matter of the sale is charged with an annuity as security for the advance, and this annuity is a charge upon the land, not upon rent.

Further, the effect of the lodgment of an agreement to purchase under the Land Purchase Acts is to determine the relation of landlord and tenant, and to vest the holding in the previous tenant; and the consent of the landlord or grantor has, under the Redemption of Rent Act (section 1), the same effect: see *Vickery* v. *Deane* (1). The estate of a fee-farm grantee after a vesting order has been made in his favour, is no longer liable to eviction or other determination, but is an absolute estate.

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(1) 32 L. R. Ir. 36.

The objection that section 29 of the Registration of Title Act could have no application to a case under the Redemption of Rent Act, would equally apply not only to the case of an agreement to sell by a fee-farm grantor under the Purchase of Land Act, 1885, but also to the case—clearly within the Purchase Acts—of an agreement to sell by a landlord, not a fee-simple owner, to a tenant holding from him for the same term as he himself held.

[Counsel also referred to *Gyles* v. *Beausang* (1), and *Re Lynch* (2).]

Madden, J.:—

Dec. 10.

In this case an important question has been referred to me, by the Registrar of Titles, as the Judge exercising the jurisdiction vested in the Land Judge under the Local Registration of Title Act. It arises thus:—A tenant in fee-farm, under a conveyance executed in pursuance of the Renewable Leasehold Conversion Act, applied to redeem his rent under the provisions of the Redemption of Rent Act, 1891. The grantor having duly signified her consent, the subsequent proceedings were carried on under the provisions of the Land Purchase Acts, and resulted in a vesting order, whereby the Land Commission, acting under the powers conferred on them by the Redemption of Rent Act and the Land Purchase Acts (1870–1891), purported to vest the lands comprised in the fee-farm grant in the grantee for an estate in fee-simple, charged in the usual manner with the repayment of the advance made by them. The Land Commission thereupon, in discharge of the duty cast upon them by the 23rd section of the Local Registration of Title Act, transmitted the prescribed notice to the Registering Authority, treating the title of the grantee as one to which the compulsory provisions of the Act apply, and the question submitted to me is, "Whether the above-named grantee comes within the provisions of the Local Registration of Title (Ireland) Act, 1891, and ought therefore to be registered compulsorily as owner."

The 22nd section thus enacts: "From and after the commencement of this Act, the registration of the ownership of freehold land shall be compulsory where the land has been at any time sold and conveyed to or vested in a purchaser, under any of the provisions of the Purchase of Land (Ireland) Acts, and is subject to any charge in respect of an annuity or rentcharge for the repayment of an advance made under any of the said provisions on account of the purchase money."

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(1) [1895] 2 Ir. R. 325.

(3) 29 Ir. L. T. R. 99.

The determination of the question referred to me depends on the answer to two inquiries: 1. Is the Redemption of Rent Act a Land Purchase Act, within the meaning of the words which I have quoted from the Local Registration of Title Act? 2. In the case of the redemption of a fee-farm rent, is the subject-matter of the sale "land," within the meaning of the same statute? Unless both these questions are answered in the affirmative the compulsory provisions of the Act do not apply.

The Redemption of Rent Act received the Royal assent on the same day as the Local Registration of Title Act, and it was therefore impossible to refer to it specifically in the latter Act. But general words are found in the interpretation clauses which clearly embrace all future statutes dealing with statutory sales of lands to tenants. Sect. 95 enacts that "Purchase of Land (Ireland) Acts" means, not only a series of statutes specifically enumerated dealing with this matter, from the Irish Church Act (1869) to the Purchase of Land (Ireland) Amendment Act, 1889, but "any Act amending any of the same Acts." It is by virtue of these general words that the Purchase of Land (Ireland) Act of 1891, which received the Royal assent on the same day, is included in the statute, and they are clearly sufficient to embrace the Redemption of Rent Act, if it be an Act amending any of the Acts specifically enumerated in the interpretation clause.

Now, upon this branch of the case, I entertained no doubt upon the first argument. For the reasons which I shall presently state, I am clearly of opinion that the vesting order in the present case has been made under the provisions of a statute which falls within the definition of "Purchase of Land (Ireland) Acts" contained in the Local Registration of Title Act. It appeared to me however that the second inquiry—whether the subject-matter of sale was "land" as defined by the Local Registration of Title Act—was an important question, one of general application, inasmuch as tenants in fee-farm are included in the provisions of the Land Purchase Acts by special enactment, and I desired to have the case re-argued upon this point.

According to the interpretation clause of the Local Registration of Title Act, "Land"—except in certain sections where for definite purposes it is expressly given a more extended meaning—"includes all corporeal hereditaments, but no other hereditaments"; all other hereditaments being dealt with as burdens. This is part of the essential framework of the system. I need not go into the reasons upon which it is based: suffice it to say that this part of the machinery of the Local Registration of Title Act was supplied by the English Land Transfer Bill of 1889 which stood the test of a Select Committee of the House of Lords of which several eminent lawyers were members. I think, therefore, that I may be allowed to say that this portion of the Act, at all events, has been framed with care and accuracy, and that it was for good reason that the word "land" was, in the governing sections of the Act, defined so as to exclude an incorporeal hereditament, such as rent issuing out of land. From this it follows that unless a tenant in fee-farm buys, under the Purchase Acts, the land, as distinguished from the rent, his title is not within the compulsory clauses of the Local Registration of Title Act.

The Land Purchase Acts form part of the agrarian legislation of the last quarter of a century, and they are inapplicable where the relation of landlord and tenant does not exist. The sections of the Act of 1870, commonly known as the Bright clauses, authorised the advance of public money to a "tenant for the purpose of purchasing his *holding*" (section 44) a word (as pointed out by Barry, L.J., in *Kelly* v. *Rattey* (1), first introduced into our legal phraseology by that statute, and carried on through every one of the subsequent Land Acts, down to and including the Redemption of Rent Act of 1891. This word is defined by the Land Law Act of 1881 as meaning, during the continuancy of a tenancy, a parcel of land held by a tenant of a landlord. Part V. of that Act deals with advances "to tenants for the purpose of enabling them to purchase their holdings" (sect. 24). The

(1) 32 L. R. Ir. at p. 453.

Land Judge's Court. 1895.

In re KEOGH, *Grantor;* KETTLE, *Grantee.*

Madden, J.

Purchase of Land (Ireland) Act, 1885, known as the Ashbourne Act, authorizes advances "for enabling tenants to purchase their holdings either from the Land Commission or from the landlords of such holdings" (section 2); and it expressly enacts that "the expression tenant shall include a tenant holding under a fee-farm grant" (section 26).

The grantee in the case before me might have agreed with his grantor for purchase under the Ashbourne Act, in which case the subject-matter of sale would have been—not the fee-farm rent—but the parcel of land, the corporeal hereditament held by him of his landlord. This follows necessarily from two provisions in the Act of 1885 to which I have already referred—(1) The definition of holding; (2) the enactment admitting tenants in fee-farm and the owners of fee-farm rents to the status of landlords and tenants for the purpose of purchase. This relationship is the creation of the statute. It has a notional existence, only for the purpose of being speedily extinguished. Since the statute of *Quia Emptores* a grant in fee by a mesne lord does not create tenure in the feudal sense of the term, although such an assurance may, by contract, give rise to the relation of landlord and tenant, if executed since 1860. But the same Legislature which prohibited sub-infeudation, is powerful to enact that certain grantees in fee shall be taken as holding of their grantors, for the purpose of being included in a system of land purchase, primarily adapted to the case of tenants, properly so called. In the event which I have supposed of a sale under the Ashbourne Act, Kettle, as tenant, would be taken to have purchased from Keogh, as landlord, not the rent, but the holding; that is, the fee-simple of the lands which would be vested in him under section 8, charged under section 9 with the annuity in favour of the Land Commission.

In my opinion the subject-matter of the sale and of the vesting order is the same when the transaction is effected under the provisions of the Redemption of Rent Act. That statute, regarded as a measure of agrarian legislation, is conversant with rent, and is so described in the title. But regarded as a part of the legal machinery of this country, it is a Land Purchase Act.

It admits to the benefits of the Landlord and Tenants' Code certain classes heretofore excluded. It is not an Act for the redemption of rents generally, *Kelly* v. *Rattey* (1), but for the redemption of rent between landlord and tenant, and that redemption is effected by means of purchase of the holding under the provisions of the Land Purchase Acts. The word "holding" has the same meaning throughout the entire code, and this is the foundation of the decision in *Kelly* v. *Rattey* (1).

The first section of the Redemption of Rent Act expressly enacts that the consent of the grantor is to have the same effect as the lodgment of an agreement to purchase under the Land Purchase Acts, and that (with certain exceptions) "all subsequent proceedings shall be carried on, and with the like consequences, as upon such an agreement." The precise effect of this enactment has been considered in the case of *Vickery* v. *Deane* (2), and *In re Lynch* (3). There are certain consequences of an existing contract between vendor and purchaser which may not attach to this statutory agreement. But it has, by express enactment, the same effect as an agreement under the Land Purchase Act so far as regards the purchase of the holding, and the consequences of such purchase. One of those consequences is the sale to and vesting in the grantee something different from the rent, namely the holding, as defined by the Land Purchase Acts. Another consequence is, in my opinion, the application of the compulsory clauses of the Local Registration of Title Act.

A very important consideration is suggested by the fifth reason submitted by the Registrar, in which he urges that the registration of the grantee, in a case like the present, as owner in fee, would "give the purchaser an indefeasible title to a portion of land, the title to which had never been examined at all." But this is not the effect of registration. An indefeasible title to the fee is no doubt registered, but when the title to that interest has not been examined, registration does not defeat any estates or interests carved out of the fee, before purchase or registration.

Apart from registration, the estate in fee-simple would vest in the purchaser, under the provisions of the Land Purchase Acts, subject to any rights or equities affecting his former interest, which would be fed, not destroyed, by the vesting order. This statutory

(1) 32 L. R. Ir. 445. (2) 32 L. R. Ir. 36. (3) 29 Ir. L. T. R. 99.

Land Judge's Court. 1895.

In re KEOGH, *Grantor;* KETTLE, *Grantee.*

Madden, J.

application of the equitable doctrine of graft was a necessary part of the machinery of land purchase, with indefeasible title. But it seriously impedes the working of a system of Registration of Title. The 29th sect. of the Local Registration of Title Act deals with this matter in the only way that seemed possible. It affords to the tenant purchaser the opportunity of clearing his title to the entire interest in the land, and starting with a clear title in fee, on the occasion of first registration. If he is unable or unwilling to do this, the registering authority is empowered "to dispense with the ascertainment of such of the burdens affecting the land as have arisen from the interest vested in the purchaser by the conveyance or vesting order (as the case may be) being deemed to be a graft upon his previous interest in the land, and to note the register accordingly." It is much to be regretted that tenant purchasers, from unwillingness to incur trifling trouble and expense, have converted into a general rule what was plainly intended to be an exceptional provision for cases of exceptional difficulty. In a case like the present, the purchaser loses some of the most important advantages of a Register of Titles, if he is so ill-advised as to register his title, with a note upon the register, the effect of which is to put a subsequent purchaser upon investigation of title, antecedent to and independent of the entry upon the register. Although, therefore the injustice contemplated by the Registrar would not be the result of registration, the case illustrates forcibly the inconvenience caused by the principle of statutory graft, necessarily imported into the Land Purchase Acts—an inconvenience, however, which it is in the power of purchasers to remove.

I am therefore of opinion that the title of the grantee in this case falls within the letter, as it certainly does within the spirit, of the compulsory clauses of the Local Registration of Title Act. That Act was designed to relieve the smaller holders in fee from the ruinous expense of a system of Land Transfer and Registry of Assurances, developed under circumstances, and suitable to conditions, widely different from those of a peasant proprietary. But it was also intended to remedy a mischief of a different character. Public money, to a large and increasing extent, has been advanced on the security of holdings, and it became a matter of public and

Land Judge's Court.
1895.

KEOGH, *Grantor*; KETTLE, *Grantee.*

financial importance that the title to those holdings should be kept clear from doubt or complication. From whatever point of view the Act is regarded, a purchaser under the Redemption of Rent Act is quite as much within the spirit of its provisions, and of the mischief which it was intended to remedy, as a purchaser under the Ashbourne Act. The Registrar acted rightly in refusing to apply the compulsory provisions of the Act without an order of the Court, where there was a substantial question as to their application. I am clearly of opinion that they are applicable in the present case, and I rule accordingly.

Solicitor for the Grantee: *W. Alexander.*

W. G.

RICHARDSON'S TRUSTS.

(1896. No. 123.)

V.-C.
1896.
Feb. 24.

Appeal.
April 23.

Will—Construction—Death coupled with contingency—In case both or either of sons die leaving children fatherless, gift to such children—No prior gift to sons—One sum or two—Period of contingency.

A testator by his will declared that in case both or either of his sons, A or B, dying leaving their children fatherless, he left to such children the sum of £500 to be divided amongst them, share and share alike. Both A and B survived the testator A died, leaving children surviving him. B was alive, and had children:—

Held, that the gift was not limited to one sum of £500, and that the contingency was not confined to death in the testator's lifetime; and accordingly that the children of A living at his death were entitled to be paid £500, and that the children of B (if any) living at his death would be entitled to a similar sum.

MOTION on behalf of Alice Richardson, Louisa Richardson, Margaret Richardson, and Sarah Richardson, for transfer and payment to each of them of one-sixth part of £500 in Court, and for transfer to the separate credits of Mary Richardson a minor, and Florence Richardson a minor, respectively, of the two remaining one-sixth parts of such sum.

V.-C.
1896.
RICHARDSON'S TRUSTS.

John Richardson on the 6th February, 1887, made his will, and thereby, amongst other provisions, bequeathed to his wife a life interest in a sum of £3500 Government stock, being part of a larger sum standing in his name, to receive the interest thereof during her life so long as she should remain unmarried, but on her death or marriage then the same to be divided as follows, viz. to his son Albert the sum of £1000 stock, and to his son Alexander a like sum of £1000 stock. He gave to his said son Albert the sum of £500 Government stock, to be paid to him as soon as might be convenient after testator's death, in trust for his (Albert's) children; and to his said son Alexander he left the sum of £1000 like Government stock, payable to him as soon as might be convenient after the testator's death: and after other bequests the testator proceeded :—" and in case both, or either of my sons, Albert or Alexander dying leaving their children fatherless, I leave to such children the sum of £500 sterling to be divided amongst them share and share alike." The testator appointed his wife residuary legatee, and named her and George A. Craig executors and trustees.

The testator died on the 24th October, 1887, and on the 23rd November probate of the will was granted to the executors.

The testator's widow died on the 14th August, 1888; Jane Bell Waugh and Thomas Richardson were her personal representatives.

Albert Richardson and Alexander Richardson survived the testator and had children.

George A. Craig being uncertain whether one or two sums of £500 were to be divided amongst the children of Albert Richardson and Alexander Richardson, and whether the death referred to in the will meant death in the testator's lifetime, brought into Court under the Trustee Relief Act (11 & 12 Vict. c. 68), stock representing two sums of £500 and interest.

Albert Richardson died on the 10th April, 1892, leaving six children surviving, viz. the applicants and the two minors.

Alexander Richardson and his children were still living.

Price, *Q.C.* (with him *John Leech*), for the applicants and the minors:—

The bequest is not confined to one sum of £500, nor are the words dying leaving children fatherless, to be restricted to death in the testator's lifetime, and the children of Albert Richardson are now entitled to £500. As to the first point, the words "such children" mean the children who, by their own father's death, are left fatherless. The children of one brother would not be left fatherless by the death of the other. The children of Albert are now "such children," and £500 is given to them. It is uncertain whether any of Alexander Richardson's children will survive him, and if only one sum of £500 were intended to be divided, this should remain tied up, and it would be impossible to ascertain how much each child was entitled to until after Alexander Richardson's death. Secondly, this is one of the class of cases in which death is coupled with a contingent event, and there is no reason for restricting the meaning to death in the testator's lifetime. In *Woodroofe* v. *Woodroofe* (1), Porter, M. R., refers to the several authorities on this question, and after stating the general rule applicable to such cases, he quotes (pp. 303, 304) from the judgments of Lord Cairns, L. C., and Lord Hatherley, in *O'Mahoney* v. *Burdett* (2), and says that to exactly the same effect is the decision of the House of Lords in *Ingram* v. *Soutten* (3). See also the judgment of Lord Hatherley, L. C., in *Bowers* v. *Bowers* (4). The present case is peculiar in this respect, that there is no gift to Albert Richardson or Alexander Richardson themselves, but the same principles apply with reference to the contingency. Here the contingency is death leaving children surviving, and that may happen at any time.

[Counsel also referred to *Ayscough* v. *Savage* (5).]

R. H. Ryland, for the children of Alexander Richardson:—

In the cases in which death was held to mean death in the testator's lifetime, there was a prior gift, with a contingent gift over, depriving the original legatee of the legacy. That is not the case here, where the only gift is to the children of Albert Richardson and Alexander Richardson. See *Farthing* v. *Allen* (6), a fuller report of which *sub. nom. Allen* v. *Farthing*, is given in

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(1) [1894] 1 Ir. R. 299.

(2) L. R. 7 H. L. 388.

(3) *Ibid.* 408.

(4) L. R. 5 Ch. 244, 247.

(5) 13 W. R. 373.

(6) 2 Mad. 310.

2 Jarm. (5th ed.), 1596. The words "both or either" must be read distributively, and indicate that if the contingency mentioned happened in the case of both sons, two sums of £500 were to be paid to the children.

T. Pakenham Law, Q. C., for the personal representatives of the testator's widow:—

Only one sum of £500 is given by the will, and the contingency is death in the testator's lifetime, leaving children. This case is different from those in which there is a prior gift to the parent. One sum is mentioned, and the meaning is that it should be paid at one time, which could only be that of the testator's death. See *Creery* v. *Lingwood* (1). "Leaving their children fatherless" means leaving them unprovided for; the words point to death in the lifetime of the testator, and the intention is to provide for the children until the other legacies should become payable: see *Peard* v. *Morton* (2), where many of the cases on the subject are cited. There is nothing to show an intention to give two sums of £500, and it would be impossible, if the death referred to were death at any time, to ascertain who were entitled, until both Albert Richardson and Alexander Richardson were dead. The gift has failed, as none of the children were fatherless at the death of the testator. *Woodroofe* v. *Woodroofe* (3) merely collects the authorities. In *Farthing* v. *Allen* (4) the words were quite different, and in *Ayscough* v. *Savage* (5) the gift was to the children living at the *respective* deceases of the testatrix's son and daughter, thus referring to the death of each.

Leech, in reply:—

The words "both or either" are used distributively, and indicate that the testator dealt separately with each class of children: the word "such" refers to those children left fatherless; and on the death of Albert Richardson his children came under this description, and became immediately entitled to £500. There is no mention of £250, so that in the events which have happened, if the gift were to be restricted to one sum of £500, no payment could be made to any of the children so long as Alexander Richardson was alive; and the very object of the bequest, to provide for such children when fatherless, would be thwarted. The contingency here is not death, but is leaving children; the word dying is superfluous, and may be struck out. In *Creery* v. *Lingwood* (1), there was a direction that the residue should be divided equally between the children, showing an intention that the fund was to be immediately distributed, as to which see the judgment of Lord Hatherley in *Bowers* v. *Bowers* (2). In *Peard* v. *Morton* (3) the judgment was based on the fact that the trustees were directed to convey the residue to the testator's son, who was the primary object of his bounty: see the judgment of Kay, J., p. 398. The present is not the case of a substitutionary gift: the object was to give to the children becoming fatherless an immediate gift of £500, the word fatherless, which would otherwise be unnecessary, showing an intention to benefit them when they should be deprived of the support of their father.

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(1) 19 Ch. D. 470.
(2) 25 Ch. D. 394.
(3) [1894] 1 I. R. 299.
(4) 2 Mad. 310; 2 Jarm. (5th ed.) 1596, *sub nom. Allen* v. *Farthing.*
(5) 13 W. R. 373.

THE VICE-CHANCELLOR :—

The inaccuracies in the language used by the testator have given rise to the questions which have been argued before me. These inaccuracies occur in the following words :—" In case both or either of my sons Albert or Alexander dying leaving their children fatherless, I leave to such children the sum of £500 sterling, to be divided amongst them share and share alike." If the testator had used the words: " In case of both my sons dying . . ." there would have been no question that only one sum of £500 was given; and if he had said, " In case of either of my sons dying . . .," it would have been clear that he intended two sums to be payable in certain events. Under the circumstances here which is the more reasonable construction? In my opinion he contemplated providing for the children of a son dying, and leaving them unprovided for, and it is more likely that he intended a sum of £500 for them immediately on being left fatherless, than that one such sum should be retained to be ultimately divided amongst all the children of both sons when the survivor of the sons should die. There is considerable force in the word "fatherless," indicating the death of the natural provider for the children, and showing that the testator contemplated that they would stand in need of some provision. I think that fair and reasonable effect should be given to this word, and there being two constructions open, I adopt that which allows two sums of £500, one to each of the families.

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(1) 19 Ch. D. 470. (2) L. R. 5 Ch. 244. (3) 25 Ch. D. 394.

The next question arises on the words "dying leaving their children fatherless." At what period of time must this event happen? This is not a case in which the Court is compelled, in order to avoid a failure of intention, to confine the death to the period of the testator's life. That construction is not to be resorted to unless no other contingency is mentioned; and where a contingency is coupled with death there is no necessity for limiting it to the life of the testator. The contingency must be ascertained from the will itself, and in the present case it sufficiently appears that the contingency contemplated is the death of a son leaving his family without provision. What I have already said with regard to the force to be given to the word "fatherless" applies also to this branch of the case: the word indicates that the necessity for the legacy would arise on the death of the son, and it would to some extent defeat the object which the testator had in view, viz. to provide for the children when left fatherless, to hold that the legacy was only to be payable if the son died in the testator's lifetime.

To hold that only one sum was intended, and that it was to to go amongst the children of both sons at any time surviving their parents would lead to great inconvenience. At the death of the testator it would be impossible to ascertain the class, and this could not be done until the death of the surviving son. Are the children of Albert, who have now survived their father, to be deprived of all benefit so long as Alexander Richardson lives? I think that the children who become entitled together, form one class, and that they are not to be postponed until it is ascertained whether the children of the other son become entitled.

In my opinion £500 is now payable to the children of Albert, without waiting for the death of Alexander, and the funds representing the second sum must be placed to a separate credit for the children (if any) of Alexander living at his death.

V.-C. 1896. Richardson's Trusts.

D. M'C. M.

The personal representatives of the widow appealed.

Appeal. 1896. April 23.

The Court of Appeal (Fitz Gibbon, Barry, and Walker, L.JJ.), affirmed the decision of the Vice-Chancellor.

Solicitors for the children of Albert Richardson and Alexander Richardson: *R. P. Froste and Co.*

Solicitor for the personal representatives of the testator's widow: *G. R. Wade & Son.*

R. D. M.

In re OLD BUSHMILLS DISTILLERY CO., Limited; (1894. No. 680.)

Ex parte BRYDON;

Ex parte BANK OF IRELAND.

V.-C. 1895. Feb. 13, 14, March 11. Nov. 20, 21, Dec. 13.

Appeal. 1896. Jan. 13, 14. 15.

Company—Debentures—Charge on undertaking and property—Power to deal with property in course of business—Prohibition against creating mortgage in priority to debentures—Colourable sale—Mortgage—Notice—Priority.

A Distillery Company, with power to create debentures and to borrow on mortgage, issued debentures, and executed a trust deed to further secure the debenture debt. By these documents the undertaking and all the property, present and future, of the Company were charged with the debenture moneys as a first charge thereon. The Company was to be permitted, until default in payment of interest, &c., in the course of its business and for the purpose of carrying on same, to use, sell, or otherwise deal with the mortgaged premises, but so that it was not to be at liberty to create any mortgage or charge on same in priority to or overriding the deed or the debentures, and the latter were to take precedence over all moneys which might be raised by the Company by any means whatsoever.

The Company applied to B to accept a bill against whisky of the Company in bond, and this transaction was carried out by what purported to be a sale of the whisky to B, with a right in the Company to repurchase. The bill

V.-C.
1895.

In re
OLD
BUSHMILLS
DISTILLERY
Co.

was discounted at a Bank, and the whisky was subsequently transferred into the Bank's name in the books of the Company and of the excise authorities.

The Court being of opinion, on the evidence, that the transaction amounted to a loan, on the security of the whisky, and that B had express notice of the debentures, and that they contained a prohibition of borrowing money on the assets:—

Held by the Vice-Chancellor, that the transaction came within the restriction against creating any mortgage or charge on the property, and the provision that the debentures should take precedence over all moneys which might be raised by the Company by any means whatsoever; and that B was not entitled to hold the whisky as against the debenture holders.

The Company being in want of money, two of its directors applied to a Bank to discount bills drawn on the Company by one of the directors in favour of the other, and accepted by the Company. The money was placed to the account of the payee, but it was in a few days drawn out and used by the Company. The bills were several times renewed, but ultimately the Bank, before further renewing, required collateral security. The Company thereupon purported to sell to the directors a quantity of whisky for the amount of the bills; and with the renewals, warehouse warrants for the whisky, describing it as entered in the names of the two directors, and deliverable to them or their assigns by indorsement, and which warrants were indorsed by the directors, were handed to the Bank. Invoices of the whisky, showing that the directors had purchased same from the Company, were also given to the Bank; and subsequently the whisky was entered in the excise books in the names of trustees for them.

The Court being of opinion, on the evidence, that the transaction was a plan to create, through a pretended sale to the directors, a mortgage or charge on the whisky having priority over the rights of the debenture holders; that the Bank knew that the money was required for the purposes of the Company; that when the Bank last renewed they had express notice of the existence of the debentures, and that they were in such a form as to preclude the Company from pledging or mortgaging the whisky, or giving it as a security to the Bank; and that the Bank had notice that the transaction was a loan carried out by way of sale.

Held by the Vice-Chancellor, that the Bank were not entitled to the whisky as against the debenture holders. This decision affirmed on appeal.

THE Old Bushmills Distillery Company, Limited, was incorporated on the 31st October, 1891, to acquire and carry on a distillery business, and with power to issue debentures. The articles of association gave (Art. 106), amongst others, power to the directors to borrow money and to give security for repayment thereof by mortgage, bill of sale, or deposit of title deeds, of the whole or any part of the property of the Company, or in such other manner as they deemed best.

The Company issued debentures, and executed a trust deed dated the 12th January, 1892, as further security for the debenture debt.

The trust deed was made between the Old Bushmills Distillery Company, Limited, of the one part, and George Johnston (thereinafter called the trustee) of the other part. It recited that the Company was seized of certain hereditaments therein described, and had determined to raise £100,000 on 10,000 debentures of £10 each, such debentures being in the form set out in the 3rd schedule, and further to secure the said sum and the interest from time to time to become payable on such debentures in manner thereinafter appearing: it conveyed the hereditaments to the trustee on the trusts thereinafter declared: it declared that the trustee should stand seized and possessed of the said premises and all other the premises charged by said debentures (thereinafter called the mortgaged premises) upon trust to permit the Company in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with the mortgaged premises or any part thereof (but so that the Company was not to be at liberty to create any mortgage or charge on same in priority to or overriding those presents or the said debentures) until default should be made in payment of some interest secured by the said debentures or any of them for the period of three calendar months, &c., or until an order of some Court of competent jurisdiction should be made or an effective resolution of the Company be duly passed for the winding-up of the Company, or until, &c., and from and after such default, &c. (powers and trusts to take possession of the mortgaged premises, and realize and sell, &c.) The deed, amongst other things, contained a covenant by the Company that the principal moneys and interest intended to be secured by the said debentures should be a first charge on the mortgaged premises, and the said principal moneys and interest should take precedence over all moneys which might thereafter be raised by the Company by any means whatsoever, and provided (clause 21) that the property charged by said debentures and not by the deed conveyed or assigned should be subject to all the trusts, powers, provisions, and conditions therein contained as fully and effectually as if same had been thereby conveyed and assigned.

The form of debenture given in the 3rd schedule to the deed was, so far as material, as follows :—

> The Old Bushmills Distillery Company, Limited (hereinafter called the Company) hereby acknowledges that it is indebted to the registered holder of this debenture in the sum of £10, and the Company will, as and when the principal money hereby secured becomes payable in accordance with the conditions hereof, pay to the registered holder of this debenture at the registered office of the Company for the time being, the sum of £10 sterling. Provided that, except in the events hereinafter mentioned, the Company shall not be called upon or required to pay said principal money.
>
> And the Company will also, &c. (provision of payment of interest).
>
> And for the consideration aforesaid the Company doth hereby charge with such payments, its undertaking and all its property, real and personal, both present and future, including its uncalled capital for the time being; and for the better securing such payments, the real property of the Company has, by an indenture bearing equal date herewith, and made between the Company of the one part and George Johnston of the other part, been vested in the said George Johnston as a trustee. And this debenture is issued subject to all the provisions and conditions therein contained, which shall be as binding on and apply to the registered holder of this debenture, and he shall be entitled to the benefit thereof, as fully as if such registered holder had been a party to and had executed such indenture. And any property hereby charged, and not conveyed or assigned by said indenture, shall be dealt with, and be subject to the trusts, powers, provisions, covenants, conditions, and agreements contained in said indenture, as fully and effectually as if same were repeated herein.
>
> And it is hereby declared that this debenture is issued upon and subject to the following conditions :—
>
> 1. This debenture is one of a series, &c.
>
> 2. The debentures of the said series shall rank, *pari passu*, as a first charge upon the property hereby charged, and without any preference or priority one over another.
>
> 4. Notwithstanding the charge hereby created, the Company shall be at liberty, in the course of its business and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property, until the principal money hereby secured becomes payable in accordance with the conditions hereof, and then the liberty and authority to the Company, hereinbefore given, shall forthwith cease and determine, and the charge by this debenture created shall and may be immediately enforceable, subject, however, to the provisions of said indenture.

5. Nothing herein contained shall be taken to authorise the creation of any mortgage or charge of or upon the said property or any part thereof, having priority over, or equal rank with, the said charge hereby created.

Debentures to the extent of £100,000 were issued.

On the 14th August, 1894, a resolution was passed for a winding-up subject to the supervision of the Court, and appointing John Malcolm liquidator; and on the 29th October, 1894, an order was made on a creditor's petition directing the winding-up to be continued subject to supervision, and the said John Malcolm to be continued as liquidator.

In August, 1894, an action was commenced on behalf of the debenture holders to have the trusts of the deed of the 12th January, 1892, carried into execution, and for a receiver; and on the 15th November, 1894, an order was made appointing the said John Malcolm to be such receiver.

EX PARTE BRYDON.

Feb. 13, 14.

This was a motion by Brydon & Co., Limited, for a declaration that certain casks of whisky were validly sold or pledged by the Company to them, and that they were entitled to pledge or assign the same to the International Bank, Limited; and that the liquidator of the Company and the trustee for its debenture holders were not entitled to retain possession of the whisky, and were not owners thereof except subject to payment to the said Bank, in relief of the applicants, of the bills drawn by the Distillery Company for £2503 16*s.* on Brydon & Co., Limited, and discounted with the said Bank, and the renewals of such bills; and that the trustee might be ordered to pay the applicants damages sustained by them owing to his having withheld the said whisky from them and the persons to whom they had sold same; or that the applicants might be at liberty to sue the trustee or the liquidator for such damages.

An affidavit of William Walter Brydon, Managing Director of Brydon & Co., Limited, stated that in September, 1893, James Steen Boyd, the Managing Director of the Bushmills Company, inquired of him whether Brydon & Co. would accept certain bills against, and to be secured by, whisky warrants to the extent of £2500 for a consideration of £4 per cent., and that after some

V.-C.
1895.
In re
Old
Bushmills
Distillery
Co.;
Ex parte
Brydon.

negotiation Brydon & Co. agreed to do so, and on the 19th September, 1893, 11,473¼ gallons of whisky of the Bushmills Company were invoiced to Brydon & Co., and a bill was accepted against same by them for £2500, payable in four months. This bill, with the warrants for said whisky attached, was discounted with the International Bank, Limited, by the Bushmills Company, and at maturity, on January 22nd, 1894, same was renewed with said Bank, stamp duty and discount being added, the renewal falling due on the 22nd May, 1894. At that date the Bushmills Company was believed to be perfectly solvent. The Company was asked by Brydon & Co. to take up the bill, as Brydon & Co. were desirous of getting rid of the responsibility on foot thereof, but the Company pressed them to consent to a further renewal. The said bills were wholly for the accommodation of the Bushmills Company who received from the Bank the entire amount of same, less discount. The whisky so invoiced was contained in 139 casks, and was, at the time of said invoicing, specifically set apart for Brydon & Co., and appropriated to said transaction, and entered in the books of the Bushmills Company as the property of Brydon & Co. The Bushmills Company, after continued pressure and representing that the transaction had been passed through their books as a sale, induced Brydon & Co. to consent to a further renewal on the terms of the Bushmills Company, taking up a bill for £382 4*s.* 8*d.*, made for the accommodation of Brydon & Co., which, however, the Bushmills Company failed to do. Considerable correspondence took place, the deponent urging the Bank and the Bushmills Company, as additional security, to have the whisky transferred into the name of the Bank in the books of the excise authorities, and ultimately this was done. Brydon & Co., with a view to taking up their acceptance at maturity, arranged with the Bank to have a sale of the whisky, and, after notice to the Bushmills Company, had a sale thereof by whisky salesmen and auctioneers on the 31st August, 1894, with the consent of the Bank. The proper documents for the transfer of the whisky to the purchasers were presented to the liquidator, but he refused to allow it to be transferred to them, and claimed to hold same on behalf of the debenture holders of the Bushmills Company. Brydon & Co. being unable to procure delivery to the purchasers were obliged to pay them £234 7*s.* 5*d.* for loss and damage. The money so secured by Brydon & Co. was all received and used by the Bushmills Company for purposes of their ordinary trading and business, and was believed by the deponent to be intended to be so used, and the dealings between Brydon & Co. and the Bushmills Company were in the ordinary way of business and *bona fide*. An action brought on the bill by the Bank against Brydon & Co. was pending. A number of letters were referred to in the affidavit.

James Steen Boyd made an affidavit, in which he stated:—The Bushmills Company, at the time of negotiating the transaction in question, required money for carrying on its business, and to pay working expenses; and for the purpose of raising this money he had an interview with Mr. Hanna, Brydon's partner (their firm not being then a limited Company). Hanna offered to advance money against whisky, and the deponent explained to him that the Company could not mortgage the whisky, owing to the debentures, and that they could only deal with it by way of sale. The transaction was negotiated principally with Hanna, but Brydon was brought into it, and also suggested its being an advance; but deponent also informed him that he could not, owing to the debenture deed, take any advance against whisky, and that he could only sell it; but he also told them that the Company would likely require the whisky for the purposes of their trade, and that they were sure to be purchasers from Brydon & Co., if it did not suit their trade; and at their request an undertaking to this effect was subsequently put in writing. The contract note was accordingly made out and signed by Brydon & Co. and the Bushmills Company, and bills were drawn for the amount of the whisky, viz. £2500, and £3 16*s.*, and accepted by Brydon & Co. The warrants for the whisky were attached to the bills. The bills were renewed by Brydon & Co. in accordance with the contract, the pressure to renew being brought by the deponent and not by Brydon & Co. He never regarded the bills as accommodation bills in the ordinary sense, although no doubt the transaction originated in the Bushmills Company requiring money to carry on its business; but he always looked upon the money as being raised by way of a sale of the whisky and not by way of a mortgage of it. The deponent threw no obstacle in the way of having the whisky entered in the name of the Bank when they presented the warrants.

The liquidator deposed that on getting intimation of the intended sale by Brydon & Co., in August, 1894, he caused his solicitor to caution them against proceeding with the same. On the 30th August, 1894, he was served with a notice by the solicitors for George Johnston, cautioning him against parting with any of the whisky in his custody as liquidator, as the trustee claimed same for the holders of the debentures of the Company, and the deponent was advised to hold the whisky until it was determined by the Court who was entitled to it.

George Johnston also made an affidavit in which he stated, amongst other matters, that for the purpose of protecting the debenture holders, he had, through his solicitors, on the 20th August, 1894, warned the International Bank that he claimed the whisky, and called on them to transfer it to him. He believed that Brydon & Co., or their Managing Director, were, at the time that the casks were transferred to Brydon & Co., well aware that debentures had been created by the Bushmills Company.

Further affidavits were filed, which it is unnecessary to refer to.

The contract note was as follows:—

> The Old Bushmills Distillery Company (Limited) have this day sold, and Messrs. Brydon & Co., Belfast, have purchased, 11,473¼ (eleven thousand four hundred and seventy-three and a quarter) gallons of their whisky, distilled in the Spring, 1893. Price to be 4*s*. (four shillings) per gallon, nett cash, two years storage rent free, covered by insurance if required. Free of interest for the first four months.
>
> Belfast, 19*th September*, 1893.
>
> *For* THE OLD BUSHMILLS DISTILLERY COMPANY (LTD.)
> JAMES S. BOYD, *Director*.
> BRYDON & CO.

The undertaking referred to in Mr. Boyd's affidavit was as follows:—

> BELFAST, 30*th September*, 1893.
>
> MESSRS. BRYDON & CO., Victoria-street, Belfast.
>
> DEAR SIRS,—We herewith beg to hand you invoice for 11,473¼ gallons of whisky. It is understood that if this whisky is not suitable for your requirements we shall repurchase it from you at any time after one year from this

date, giving you 4 (four) per cent. commission per annum over all charges. Bills to be renewed by us from time to time.

Yours truly,
For THE OLD BUSHMILLS DISTILLERY COMPANY (LTD)
JAMES S. BOYD, *Director*.

The bill for £2500 was in the following terms:—

BELFAST, 19*th September*, 1893.

£2500. Four months after date pay to our order the sum of £2500 sterling, value received in whisky, documents for 139 casks whisky attached, to be given up on payment of this draft.

For THE OLD BUSHMILLS DISTILLERY COMPANY (LTD.)
JAMES S. BOYD, *Director*.
S. B. M'CREERY, *Secretary*.

MESSRS. BRYDON & Co., Victoria-street, Belfast.

The bill for £3 16*s*. was similar.

The body of the warrants attached were to the following effect:—

Warrant for thirty-seven casks our whisky, distilled by us, and warehoused on 1st May, 1893, as under, containing 2859 gallons in No. 7 warehouse, at the Old Bushmills Distillery, Bushmills, Co. Antrim, entered to Messrs. Brydon & Co., Belfast, on the 19th September, 1893, deliverable to Messrs. Brydon & Co., or assigns by endorsement hereon. Insured against fire. Rent commences on the 19th September, 1893; all other charges from the date of this warrant.

In addition to other correspondence the following letters, dated the 16th June, 1894, 24th July, 1894, and 2nd August, 1894, from W. W. Brydon (the first two to James S. Boyd, and the third to the Secretary of the Bushmills Company) were given in evidence:—

Some time ago I wrote you as to the position of Bushmills Distillery, but no doubt you were too busy to reply. Will you kindly let me know if the whisky we hold as security for the bill discounted in the International Bank is entered in our name in the excise books as well as the Company's books, as, if not, it must be done at once for the protection of all concerned, but before communicating with the International Bank, I thought it best to write you. In event of any contingency the security we hold for the bills is quite inadequate, and I think you should double the amount of cover to place us in the same position we always placed you, when the warehouse bills were under discount.

Mr. Scully writes to me to say that you are throwing every obstacle in having the whisky, which we held as security for the bill, being removed to an independent warehouse, and properly secured; and also that you advanced, for the first time, the extraordinary statement that "this whisky was a purchase." You are well aware that there is not the slightest foundation for this, and I wish you to write me, immediately on receipt, a letter to this effect. Acting in the interests of the Bushmills Company and fearing to injure them in any way, I have been much too long in taking steps to protect the interests of my little Company. The bill should never have been renewed, and I look to you to fully protect me.

Having written two letters to your Managing Director, without receiving any answer, we beg to make a formal application for a written acknowledgment of your liability for the accommodation bill drawn by you, and accepted by us for £2594 2*s.* 6*d.*, due 22nd September, and commission as arranged, for which we hold as security 139 casks of Bushmills whisky, bonded September, 1893, and lying to our order at distillery. When this bill last matured we gave you notice to take it up, or in the event of not doing so, either to halve the amount or double the security, and it was only on the urgent representation that it would hurt the sale of the place, that we consented to renew the bill once more, but in lieu of giving the additional cover we required, your Managing Director agreed to be responsible for the bill accepted by you, and falling due on 31st. ult., which, we have just been informed, has been dishonoured. We call upon you, therefore, either to immediately take up the bill under discount, or, failing to do so, at once double the amount of whisky we hold as cover, and we await your reply by return of post, certain.

Matheson, Q.C. (with him *Cuming*), in support of the application:—

The transaction was a sale with a right of re-purchase, and there is no suggestion that the Company desires to exercise that right; but even if it amounted to a mortgage it is valid, and Brydon & Co. have a charge on the whisky pledged, which takes priority over the debenture holders' security. The trust deed conveys the real estate only. The debentures create a charge on the business of a going concern; they cannot interfere with the carrying on of that business, one of the incidents of which is borrowing money in case of necessity; and a mortgage to secure a loan obtained for the purpose of conducting the business in the ordinary course takes priority over a general charge such as there

V.-C.
1895.

In re
OLD
BUSHMILLS
DISTILLERY
CO.;
Ex parte
BRYDON.

is here: *In re Hamilton's Windsor Ironworks* (1), and *Gibbs and West's Case* (2) there cited; *In re Florence Land and Public Works Company* (3), and the judgment in that case (p. 547), of James, L.J., referring to the observations of Sir G. M. Giffard, L.J., in the case of *In re Panama, New Zealand, and Australian Royal Mail Company* (4); *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (5). Moreover the transaction here does not amount to a mortgage or charge within the meaning of the debentures. There is no proof of notice of the terms of the debentures, and Brydon & Co. have priority on that ground: *English and Scottish Mercantile Investment Trust* v. *Brunton* (6).

Gordon, Q.C. and *J. H. Moore*, for the liquidator and receiver:—

The transaction was intended as a mortgage, but it is invalid as against the debentures. The form of the debentures in the present case is new, and the authorities cited do not apply: *Brunton* v. *Electrical Engineering Corporation* (7), and the judgment there (p. 439, *et seq.*), of Kekewich, J. The decision in that case was on the ground that the solicitor's lien was not a "mortgage or charge" within the meaning of the debentures, and was not moreover "created by the Company." [Counsel referred to the provisions of the debentures and trust deed in the present case and to Chadwyck Healey on Company Law (3rd Ed.) 178]. By the debentures in *In re Horne and Hellard* (8), it was provided that the charge should until default be a floating security, not hindering dealings with the property of the Company in the course of its business as a going concern, and it was held that the purchaser was entitled to evidence that there had been no such default. Here there is an absolute prohibition against mortgaging in priority to the debentures. In *English and Scottish Mercantile Investment Trust* v. *Brunton* (6), the question was one of constructive notice. Here Brydon & Co. admittedly had actual notice of the prohibition against mortgaging. The transaction was a mortgage: *Ex-parte O'Dell* (1); and throughout the correspondence and until the institution of these proceedings, Brydon & Co. contended that it was a mortgage and not a sale. The debentures enabled sales to be made in the ordinary course of business. The agreement to take back the whisky if unsuitable for Brydon & Co.'s business precludes the transaction from being regarded as a sale in the ordinary course.

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(1) 12 Ch. D. 707.
(2) L. R. 10 Eq. 312.
(3) 10 Ch. D. 530.
(4) L. R. 5 Ch. 318, 322.
(5) 29 Ch. D. 715.
(6) [1892] 2 Q. B. 1, 700.
(7) [1892] 1 Ch. 434.
(8) 29 Ch. D. 736.

Stanley, Q.C. (with him *Denning*), for the debenture holders:—

The debentures precluded the Company from creating any mortgage or charge which would override the security of the debenture holders. Brydon & Co. had express notice of this. To avoid the difficulty, the device of a sale was adopted. The transaction was a mere colourable sale, being in reality a mortgage or pledge of the whisky to secure the payment of the bill. From the correspondence with the Bushmills Company this is transparent. W. W. Brydon treated the transaction as a security only, and repudiated its being a sale. In *Yorkshire Railway Wagon Company* v. *Maclure* (2) the decision on appeal (3) was on the ground that the transaction was really what it purported to be: see the judgment of Jessel, M. R. (p. 314). If the Court had been of opinion that it was a mere device or cloak to conceal a loan, the decision would have been different: see the judgment of Lindley, L. J. (p. 317). Here there was merely a colourable sale adopted as a device to get over the prohibition against mortgaging.

Cuming, in reply:—

Condition 4 of the debentures merely purports to give powers conferred by law: it is unnecessary and immaterial, and the next condition is merely an exception from those powers. There is no express prohibition against mortgaging.

March 11

THE VICE-CHANCELLOR:—

This was a motion by Brydon & Co. for a declaration that the transfer to them by the Company in liquidation of a large quantity of their whisky was valid either as a sale or as a pledge, not only against the Company, but against the holders of the debentures of the Company, so as to give Brydon & Co. either the right to dispose of the whisky as their own, or to hold it as security for the acceptances of the Company given to them for a sum of £2500 and interest.

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(1) 10 Ch. D. 76. (2) 19 Ch. D. 478. (3) 21 Ch. D. 309.

There are two principal questions to be decided, one of fact and the other of law. The question of fact is what was the true nature of the transaction between Boyd, the Managing Director of the Company, and Brydon & Co.; whether it was, as it purported to be, a sale with a conditional right of repurchase, or a mortgage or pledge of the whisky as security for a loan. Boyd wanted £2500, and applied on behalf of the Company to Brydon & Co., who are large spirit merchants in London, to accept the Company's drafts against, as it is termed, whisky of the Company, which he offered to transfer to them. Brydon & Co. stated their willingness to accept the bills for the accommodation of the Company upon having a transfer of an adequate quantity of whisky by way of security. However, Boyd stated to Mr. Hanna, acting for his firm of Brydon & Co., that it would not be possible to carry out the transaction in this manner in consequence of the rights of the debenture holders, which precluded the Company from pledging their assets for loans in priority to the debentures. He then suggested a device for avoiding this difficulty by giving the transaction the colour of a sale, with a right of repurchase within twelve months on certain terms. This was agreed to by the Brydons, and they accepted on the faith of it the Company's bills for £2500, and got an invoice of the whisky, which, however, remained for some time in the bonded warehouse in the name of the Company. Both Hanna and Boyd really, as I have no doubt, intended that this transaction should be a loan on the security of whisky pledged with Brydon & Co. by Boyd for the Bushmills Company. The colour given to the transaction at Boyd's instance was plainly for the purpose of evading the difficulty stated by Boyd as arising on the debentures and the trust deed securing them, of both of which I think it is proved Brydon & Co. had notice. In taking this view of the question I am entirely in accord with the view not only expressed, but insisted on, by Brydon in his letters which have been read in evidence. In his to Boyd of the 16th June, 1894, he speaks of the whisky as held by Brydon & Co., "as security for the bill discounted." [His Lordship read this letter.] In another of the 24th July, 1894, he says:—[His Lordship read from this letter]. Again, in a letter from Brydon to the Company, dated 2nd August, 1894, he writes:—[His Lordship read from this letter]. In the face of these letters it is impossible for Messrs. Brydon to contend that this transaction was not a loan on mortgage "carried out by way of sale." As a matter of course the formality of a sale note was gone through, and, what I have no doubt was considered by Mr. Boyd a clever device, the letter of the 30th September, 1893, was written by him to the Company. [His Lordship read this document.]

But then a more difficult question arises, one of law, whether assuming this to have been a loan on a pledge of the whisky, the security though valid against the Company, can take priority to, or rank equally with, the debentures issued by the Company. This depends upon the operation and effect of the debentures and the deed of trust executed to secure them. It must be taken as settled law that a debenture in the form in general use till recently, operated only as it was termed by way of "floating charge" on the Company's undertaking, regarded as a going concern. But it is also decided that debentures may be so framed as to prevent a Company from pledging or mortgaging their assets, so as to create specific charges, to the prejudice of debenture holders, by taking priority as to the assets so pledged or mortgaged over the debentures. Such was the third class of debentures mentioned by Charles, J., in *English and Scottish Mercantile Investment Trust* v. *Brunton* (1), and dealt with by him and by the Court of Appeal in that case, as being sufficient to restrict a Company from giving any prior charge. That form it appears was adopted in consequence of the decision of North, J., in *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (2), where it was held that debentures in the form then commonly used, which did not contain the restrictive clause, did not operate to prevent a Company from giving a specific charge on portions of the assets in the course of business, which would take priority over the "floating lien" of the debentures. The importance of such a restriction to persons advancing their money on the security of debentures is plain from this, that without it a Company could specifically mortgage or pledge any amount of their assets to subsequent lenders without notice, and thus all, or at least a large portion, of their assets might be withdrawn from the security of the debentures. There is nothing to prevent, or render illegal, such an express contract being made between persons advancing money on debentures and the Company with which they contract. It must, of course, be ascertained from the language of the debentures whether they contain such a clause. In the present case the debentures are precisely similar to those in the case in the Queen's Bench Division, to which I refer. Their form is given in the third schedule of the trust deed of the 12th January, 1892, and incorporates the provisions of that deed, so that both must be read together. They charge with payment of the amount of the debentures all the property of the Company, real and personal, both present and future. They refer to the deed which conveyed all the real property of the Company to a trustee for the better securing the payment of them. [His Lordship read from the form of debenture in the third schedule to the trust deed.] They then set forth the conditions upon which the debentures are issued. Clause 4 is the ordinary one which was found in the second class of debentures, referred to by Charles, J., and the Court of Appeal, which is similar to that in *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (1). If the form rested there, this case would be probably ruled against the debenture holders, but it proceeds:—No. 5. [His Lordship read this condition.] This is an express restriction of the otherwise unlimited authority given by clause 4, and brings the case within the third class of debentures I have mentioned. The trust deed, clause 1, declares that the trustee shall, until one of the events there mentioned shall occur, permit the Company in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with the mortgaged premises or any part thereof, but it adds the important proviso, that the Company is not to be at liberty to create any mortgage or charge on the same, in priority to or overriding the deed or the said debentures. In a later clause the Company covenants with the trustee, that the principal and interest secured by the debentures shall take precedence over all moneys which might thereafter be raised by the Company *by any means whatsoever.*

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(1) [1892] 2 Q. B 1, 9; on appeal, *ibid.* 700

(2) 29 Ch. D. 715.

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(1) 29 Ch. D. 715.

Clause 21 provides that the property charged by the debentures, and not conveyed by the deed, should be subject to all the trusts, powers, provisions, and conditions therein contained, as fully and effectually as if same had been thereby conveyed and assigned.

Thus, not only by the debentures but by the trust deed, which, by this last clause, is extended to all property, real and personal, charged by the debentures, that is to say all the assets of the Company, I find that the general power of the directors of dealing with the assets is restricted.

Then it was contended that the pledging of the whisky should not be deemed to be the creation of a mortgage or charge upon "the said property or any part thereof." These words are, in my opinion, wide enough to include the raising of a sum of money by way of loan, as was done here, if my opinion on the first question, as to the true nature of the transaction, is correct. The subject-matter of the security was whisky, manufactured by the Company, and therefore included in the words "the said property or any part thereof." Besides there is the important clause in the deed that I have mentioned, that the debentures shall take precedence of all moneys which should be thereafter raised by the Company by any means whatsoever; words that I cannot restrict so as to exclude them from applying to the transaction in question.

It was further contended that there is no sufficient proof of notice to Messrs. Brydon of the restrictive clause of the debentures and that the case therefore comes within the authority of *English and Scottish Mercantile Investment Trust* v. *Brunton* (1). The question there was one of constructive notice arising from the fact that on the negotiation for a loan to the Company, on an assignment by them of their interest in a specific portion of their assets, the solicitor of the lender knew that debentures had been issued by the Company but was not aware of their form, and asked the Managing Director of the Company whether the debentures were secured by any trust deed which might affect the assets proposed to be assigned, and was told by him that there was nothing whatever. He made no further inquiry, and the loan was carried out. The doctrine of constructive notice was much discussed, and the authorities considered. Cases were referred to where a person has notice of a deed which, from its nature, must affect the property in question, and others, where from its nature, it may or may not affect it. In the former the person is held to be affected with notice whether he inquires or not; in the other he is bound to inquire, but if informed that it does not deal with the property, he is not affected with notice although the answer to his inquiry was false. It is not necessary to consider such cases, for in my opinion there is proof here of express notice. I am satisfied upon the evidence of the witnesses, Messrs. Boyd and Hanna, who made affidavits on behalf of the Brydons, that the latter, then acting for Brydon & Co., of whose firm he was a member, was informed by Boyd, the Managing Director of the Company, that Brydon's proposal to accept the bills against the whisky, which is equivalent to lending money to the Company on the security of a transfer of the whisky to Brydon, could not be carried out because of the debentures, and that he thereupon proposed to Hanna to do the same thing by way of sale, to which the latter assented. Thus Brydon & Co. had express notice, not only of the existence of the debentures, but further that they contained a prohibition of borrowing money on the assets. Hanna made no inquiry because he was told by Boyd without inquiry; and it was assumed by both parties, that the debentures precluded a loan on the security of a transfer of whisky.

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(1) [1892] 2 Q. B. 1, 700.

A case of *Brunton* v. *Electrical Engineering Corporation* (1) was relied on where it was held that such a restrictive clause as that in this case did not preclude a solicitor of the Company from claiming

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(1) [1892] 1 Ch. 434.

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In re OLD BUSHMILLS DISTILLERY CO.; *Ex parte* BRYDON.

a lien on their papers for his costs, but it appears to have been decided on the nature of a solicitor's lien which was considered as different from a mortgage or charge created by the Company, as it arose from the relation of the parties without any act by the Company, and was given by the law and not by the Company. I do not consider that case as a decision upon the question before me.

I must therefore decide that Brydon & Co. were not entitled to hold the whisky from the trustee and receiver of the debenture-holders, and refuse their motion with costs.

Nov. 20, 21.

EX PARTE BANK OF IRELAND.

This was an application on behalf of Joseph Percival Whelan and Charles Loudon, the agent and sub-agent, respectively, of the Bank of Ireland, at Belfast, for an order that the liquidator should hand over to them 914 casks of whisky then stored in their names in the books of the Inland Revenue authorities at Bushmills, or that the applicants should be at liberty to bring an action for recovery of same.

An affidavit of the applicants stated that James Steen Boyd and Charles Cunningham Connor, who was the chairman of the Bushmills Company, were customers of the Bank, and that from time to time the Bank discounted bills for them or one of them in the ordinary course of business. The Company was not a customer of the Bank. On the 4th April, 1892, Boyd and Connor applied to Whelan to discount certain bills for £15,000, drawn by Connor on the Bushmills Company payable to Boyd or order, indorsed by him and accepted by the Company. The Bank agreed to do so, and the bills were discounted on the 7th April, 1892, and the money, less discount, was placed to the account of Boyd, who drew same within the next four days. Whelan had since heard that the money went to the Bushmills Company. The bills were several times renewed, and in July, 1893, Whelan stated to Boyd and Connor that he did not believe the Bank would further renew them unless collateral security were given. Loudon was then on vacation. When Loudon returned Boyd had a conversation with him in respect of having the bills renewed, and said he would attach warrants for whisky to the renewals; and on the 18th August Boyd handed to Loudon renewals of the bills together with warehouse warrants for 835 casks of whisky, of which 607 casks were warehoused at the bonded warehouse attached to the Bushmills Distillery, and 228 casks were stored at the Belfast Warehouse Company's warehouse in Belfast. The warrants for the whisky at Bushmills were for whisky entered to Boyd and Connor and deliverable to them or their assigns by indorsement; they were indorsed in blank by Boyd and Connor. Such warrants from warehousemen were commonly used for the purpose of the transfer or mortgage of the property specified therein. The warrants given by the Warehouse Company were in favour of the Bushmills Company or their assigns by indorsement and were indorsed by them. To satisfy the Bank Directors that the whisky belonged to Boyd and Connor the former also handed to Loudon invoices of said whisky, dated the 14th August, 1893, showing that Boyd and Connor had purchased same from the Company. Boyd, at a later date, handed to Whelan a copy of an extract from the books of the Company showing on one side the debit to the account of Boyd and Connor of the whisky as costing £15,009 14*s.* 7*d.*, and on the other side a credit for £15,000 on account of same. Deponent believed that the said sales were duly entered in the sales book of the Company.

The Bank permitted the renewal of the bills for £15,000, and held the said securities; but in the following November they required that the whisky should be entered in the excise books in the names of trustees for the Bank. Boyd then proposed that for the convenience of transfer he should be allowed to resell to the Bushmills Company the whisky warehoused in Belfast in consideration of a larger number of casks of about the same value in the Bushmills warehouse. The Bank agreed to this, provided that they were furnished with evidence that the substituted casks of whisky were sold to Boyd and Connor in exchange for those in Belfast; and accordingly they were furnished with invoices of the substituted whisky, dated 9th December, 1893, showing a sale thereof to Boyd and Connor, and three dockets dated the 9th January, 1894, showing that Boyd and Connor were credited in the books of the Bushmills Company with the cash price of the whisky returned.

In re OLD BUSHMILLS DISTILLERY CO.; *Ex parte* BANK OF IRELAND.

On the 10th January, 1894, 914 casks of whisky, which included those originally pledged, which were in the Bushmills warehouse, and those substituted for the casks in the Belfast warehouse, were entered in the excise books at the Bushmills store as the property of Whelan and Loudon, and a certificate signed by the excise officer was furnished to Loudon by Boyd. The warrants were given up by the Bank to enable the whisky to be so dealt with. The whisky still remained entered in the Government books in Whelan and Loudon's names in the bonded warehouse at Bushmills, and save that the liquidator had control of the store the whisky was at their disposal. On the 26th January, 1894, Boyd and Connor signed a memorandum of mortgage of said whisky to the Bank, with powers of sale.

The liquidator made an affidavit in which he stated, amongst other things, that on the 30th August, 1894, he was served with a notice on behalf of the trustee for the debenture holders, cautioning him against parting with the whisky in question, and claiming same for the debenture holders. The affidavit then went in detail into various matters with the object of showing that the £15,000 advanced was for the use of the Company, and that this was known to the Bank at the time: that it was pressure from the Bank that caused the warrants to be attached to the bills, and that Boyd and Connor were not then owners in their own right of the whisky; that the Bank had notice of the debentures and trust deed; that Boyd, at the time the warrants were given, expressly informed Whelan and Loudon of the existence of the debentures, and that the Company were debarred from pledging or mortgaging the whisky, and that the only mode in which the transaction could be carried out was by way of a sale to Boyd and Connor, who would then pledge the whisky to the Bank; and that Whelan and Loudon well knew that the alleged sale was merely a device by which security might be obtained to avoid the effect of the debentures.

George Johnston also made an affidavit to show that the Bank were well aware of the issue of the debentures, and of the terms thereof, and that the advance was for the benefit of the Company. The credit of £1500 (18th August, 1893) in the account of Boyd and Connor was not a payment of cash to the Company for the whisky, but was merely for the purpose of providing cash for taking up the Company's previous acceptances for that amount, which fell due on the said date to the Bank. Connor had since become an arranging debtor, and the Bank had received in respect of their claim against his estate (which included the £15,000) dividends amounting to 7*s.* in the £.

Affidavits in reply were made by Whelan, Loudon, and Alfred Henry Barlow, chief of the branch department of the Bank, dealing with the facts in controversy, and with the object of showing that the Bank dealt with Boyd and Connor alone, and had no notice of the debentures or deed, or that the dealing with the whisky was anything but a *bona fide* sale to them.

On the hearing of the motion Boyd gave oral evidence. This and the further facts and evidence in the case are referred to in the judgment of the Vice-Chancellor.

The Solicitor-General (*Kenny*, *Q.C.*), and *T. Pakenham Law*, *Q.C.* (with them, *Meredith*, *Q.C.*), for the applicants:—

The effect of conditions 4 and 5 of the debentures was to make the debentures a floating security, and thus leave to the Company full power in the course of its business to deal with its property as might be expedient. There was a *bona fide* sale of the whisky to Boyd and Connor; but even if the transaction did not amount to a real sale, Boyd and Connor had possession of the documents of title, and they pledged the whiskey to the Bank who are not under the circumstances affected by any infirmity in the prior title. See the Factors Act, 1889 (52 & 53 Vict. c. 45). The Bank were purchasers for value without notice of any fraud or defect in title. Though they had notice of the existence of debentures they had no notice of the prohibition against mortgaging, and they were entitled to assume that Boyd and Connor had purchased the whisky, more especially as they knew that Boyd and Connor had borrowed the very money for the purposes of the Company. See *Simpson* v. *Molsons' Bank* (1); *English and Scottish Mercantile Investment Trust* v. *Brunton* (2); *London Joint Stock Bank* v.

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(1) [1895] A. C. 270.

(2) [1892] 2 Q. B. 1, 700.

Simmons (1); *Bentinck* v. *London Joint Stock Bank* (2); Conveyancing Act, 1882 (45 & 46 Vict. c. 39) s. 3.

Gordon, Q.C. (with him, *J. H. Moore*) for the liquidator and receiver referred to *Brunton* v. *Electrical Engineering Corporation* (3); *Taylor* v. *M'Keand* (4).

Stanley, Q.C. (with him, *Denning*), for the debenture holders:—

The transaction was carried out between the Bank and the Company under pressure to secure payment of a past debt. The Bank through their agent, Mr. Whelan, required collateral security, and Boyd agreed to give whisky warrants, stating at the time that owing to the debentures the security could only be given by means of a sale. This patently meant a colourable sale. If an actual sale had been intended there would have been no occasion for further renewing the bills, inasmuch as in the ordinary course the Bank's claim would have been discharged out of the proceeds. Notice to Whelan of the debentures was notice to the Bank. He acted as the Bank's authorized agent in the transaction. The decision in *Simpson* v. *Molsons' Bank* (5) does not apply. In that case the knowledge acquired by the Bank officials and relied upon as constituting notice, was obtained by them in the capacity of trustee and executor and as law agent respectively of a deceased person, and not when acting as agents of the Bank. Here, Whelan was beyond doubt acting as the Bank's agent; he had notice of the debentures and of the fact that the Company's property was at least in some way affected by them, and he ought to have made inquiry as to the nature of the charge affecting the property: *Jones* v. *Smith* (6). In *English and Scottish Mercantile Investment Trust* v. *Brunton* (7), so far from the mortgagees having notice that the debentures affected the property intended to be mortgaged, their solicitor was actually misled by the managing director into the belief that there was nothing in the debentures to affect his clients' security. After the sale the Conpany remained primarily liable on the bills. By the alleged sale therefore their assets were diminished by the value of the whisky pledged to the Bank. The transaction was patently a device for the purpose of ousting the priority of the debenture holders' security.

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(1) [1892] A. C. 201.
(2) [1893] 2 Ch. 120.
(3) [1892] 1 Ch. 434.
(4) 5 C. P. D. 358.
(5) [1895] A. C. 270.
(6) 1 Ha. 43.
(7) [1892] 2 Q B. 1, 700.

The Vice-Chancellor:—

The Bank of Ireland move for an order on the liquidator to deliver up to them a large quantity of whisky made by the Company, and now bonded in their warehouses in the names of Messrs. Whelan and London, as trustees of the Bank, or for leave to bring an action against the liquidator for the recovery of the whisky.

The parties have confined their arguments to the first portion of the summons, which submits their rights to be dealt with by this Court. The question is, whether the whisky is the property of the Bank, as transferees or mortgagees of it as security for the repayment of a sum of £15,000 and interest, or whether it belongs to the trustee for the debenture holders of the Company under the debentures and the deed of trust collateral therewith.

As I have had recently to consider in the matter of Brydon's claim questions which arose as to another lot of the Company's whisky, in most respects resembling those now raised by the claim of the Bank, it is not necessary for me to go again over the opinions which I there expressed, and which I see no reason for reconsidering. What I have now to do is, to deal with the differences between the two cases. I had then to decide questions both of law and of fact as to the true nature of the transaction whether it was a sale or a loan upon security of the whisky; whether the party from whom the money was obtained had notice of the rights of the debenture holders; and whether the money secured by the debentures took priority, as a charge upon the whisky pledged, over charges or mortgages of the Company given as security for advances for the purposes of its business. I held there that a transaction between the Company and the party advancing the money, very similar to that here, was as between those parties a loan on the security of the whisky, and not a *bona fide* sale. I further held that the debentures took priority as charges upon the whisky pledged, and also that the lender had express notice of the rights of the debenture holders when he advanced his money, and was therefore precluded from setting up a charge upon the whisky in priority to those rights.

The transactions now in question commenced in April, 1892, when the Distillery Company and Messrs Boyd and Connor were in good credit. The Distillery Company had a large quantity of whisky on hand, which the directors Boyd and Connor did not consider expedient for one reason or other to sell immediately. They required a sum of £15,000 for the purposes of the Company but their debentures, which had been issued about three months previously, prevented them from creating any mortgage or charge of or upon the property of the Company, and they were unable to raise this money on the security of the whisky. It appears that before the issue of the debentures they had been in the habit of pledging whisky, as security for advances to the Company, but they were advised by their solicitors, rightly in my opinion, that they could no longer lawfully do so. Both Boyd and Connor, who were then the sole directors, had accounts with the Bank of Ireland, with whom each of them had very large transactions, but there was no account of the Company opened with that Bank. Boyd and Connor, in the month of April, 1892, applied to the Bank of Ireland, through their manager or agent, at Belfast, to discount bills to the amount of the £15,000 which they required for the Company. The Bank knew that it was for the purposes of the Company that this money was required, and they agreed to give it on the bills. There were three bills for £5000 each, at four months date, being the drafts of Connor in favour of Boyd, duly accepted by the Company, through Boyd, as managing director, and countersigned by the Secretary of the Company. The Company were of course primarly liable as acceptors, but both Connor who drew, and Boyd who endorsed the bills were liable in due order. The Bank relied on the personal credits of Boyd and Connor as well as the credit of the Company, and did not at the time require any further security. The proceeds of the bills were placed by the Bank of Ireland to the credit of Boyd's account with them, and were within a few days drawn upon to the full amount by Boyd's cheques.

It was admitted by all parties that the entire of this advance was for the purposes of the Company, and was so applied through the medium of Boyd's account with the Bank of Ireland. The bills were renewed from time to time as they fell due in the same form, and with the same parties as the originals, up to and for April, 1893. They were then renewed again for four months, ending the 19th August, 1893.

It appears that Mr. Boyd had an interview in the month of July, 1893, with Mr. Whelan, the Belfast manager of the Bank of Ireland, when Whelan told Boyd that he did not believe that the Bank would renew the current bills without collateral security. Boyd said that whisky would be given, but did not then say how the security was to be carried out. Whelan says that, so far as he recollects, nothing more was said, save that Boyd stated something to the effect that there must be a sale of whisky, as there were debentures, and that he would see into the matter. Boyd states that he told Whelan in that conversation that he was advised that on account of their debentures he could not mortgage the whisky, but that he was advised that he could continue to make sales as he had been doing, and that he would have to purchase whisky in Connor's name and his own from the distillery and attach it to the bills, and that that was the only way he could give security. He states that up to that time he and Connor had not purchased any whisky, nor had any joint transaction for the purchase of whisky. He further states that the previous sales of whisky he referred to were not for the purpose of giving security; that he told Whelan that the sale he then contemplated would be for the purpose of giving security to the Bank.

This evidence of Boyd, coupled with the admission of Mr. Whelan, and the steps taken in consequence of what then passed, satisfy my mind that when the Bank renewed the bills in August, 1893, they had express notice of the existence of the debentures, and that they were in such a form as to preclude the Company from pledging or mortgaging the whisky, or giving it as a security to the Bank.

On the 2nd August, Mr. Whelan went away for his holidays, and Mr. Loudon, the sub-manager, who had been on leave for the month of July, returned and took charge of the Belfast business of the Bank. Mr. Whelan did not inform Mr. Loudon of what had taken place between him and Boyd.

On the 14th August, Boyd and Connor, who had the entire control of the business of the Company, had entries made in the Company's books of a sale of whisky from the Company to them in their joint names for the sum of £15,000, as if it were an ordinary transaction. It was treated, as far as book-entries went, as if it were a sale to purchasers in the usual course of business. They also had warehouse warrants made out transferring the whisky which was in bond, partly in the Company's stores, at Bushmills, and partly in the stores of the Belfast Warehouse Company, of which also Boyd was the managing director, into their joint names. This was also done in the usual form, and bore the appearance of an ordinary sale. Boyd and Connor of course took care that the appearance of an ordinary sale should be kept up.

On the 18th August, the day before the current bills fell due, Boyd went to the Bank, taking with him the renewals and the warehouse warrants, indorsed in blank, and saw Mr. Loudon. Boyd swears that he then explained to Loudon the nature of the transaction. He handed to him the invoices of the whisky, made out in the names of himself and Connor, which the Bank required to see. There was, of course, no difficulty in the way of Boyd and Connor getting invoices made out in any way they pleased. They had them made out to keep up the appearance of a real sale in ordinary course.

Mr. Boyd states that he had two interviews with Loudon, in both of which his recollection is that he explained to him that on account of the debentures he could not mortgage the whisky, and that he and Connor had purchased the whisky in order to attach the warrants as security. As against these statements there is Loudon's version in his affidavit of the 16th November, 1895, of what occurred on these interviews, which is directly contrary to Boyd's evidence, and he swears that he was not then informed of the debentures or their effect, and that he believed that the sale was *bona fide*. I think that the probabilities are more in favour of Mr. Boyd's statements than of Mr. Loudon's. I cannot understand how Loudon, who says that he was prepared to renew the bills without collateral security, and that he had not heard of any such being contemplated, should, without inquiry, receive as a spontaneous offer of Boyd documents of the value of £15,000 as collateral security for renewing. The case, however, does not depend upon this balance of credit; for Mr. Whelan has sufficiently admitted that Boyd did make substantially similar statements to him. Boyd himself admitted that it was for the purpose of meeting the claim of the Bank to get security that he and Connor arranged to purchase.

A transaction which took place in January, 1894, has been much relied on by counsel for the debenture holders as being inconsistent with the contention that the sale to Boyd and Connor was an ordinary *bona fide* purchase. The Bank at that time desired that for greater security the whisky pledged to them, and which remained in the Excise books in the names of Boyd and Connor should be transferred in those books into the names of trustees for the Bank, and Boyd and Connor agreed to have this done. They suggested that for convenience sake all the whisky forming the security to the Bank should be in one store. At that time there were 228 of the casks in the bonded store at Belfast, and the residue were in the bonded store of the Company at Bushmills, and it was desired to have the whole stored at Bushmills. As there would have been some trouble in transferring the 228 casks, Boyd and Connor proposed to the Bank that the Company should buy back those casks and sell to them, in their place, a quantity of the Company's own whisky at Bushmills of equal value, which would render it necessary to increase the quantity so as to make up for the lower value of the whisky at Bushmills, which was to be given in exchange. Boyd and Connor accordingly had entries made in the Company's books representing a purchase by the Company of the 228 casks in Belfast from Boyd and Connor, and a sale to Boyd and Connor by the Company of the larger quantity of cheaper whisky at Bushmills. Not a shilling was paid on foot of this transaction, nor a cask moved. It was like the former, a mere paper transaction, which Boyd and Connor availed themselves of their position as sole directors to have entered as a real transaction in the Company's books. This is certainly more easily reconciled with the case of the whisky being still in truth the property of the Company, than of its having been sold out and out to Boyd and Connor; but it is not important as amounting to notice, and can only be fairly relied on as further proof of the sale being merely colourable.

Boyd of course stated that this was a *bona fide* purchase and sale, and that he and Connor regarded it as such. He seemed to have rather loose notions as to what is a *bona fide* sale, as appeared on his cross-examination by Mr. Gordon. I am satisfied that it was not the intention of Boyd and Connor to buy the whisky for any purpose but to enable them to pledge it the next day to the Bank, and thus evade the important term in No. 5 of their debenture contract. They purposed to do indirectly, by a colourable device, what they knew they had agreed with their debenture holders should not be done. It is not for them to say that it was justifiable on the ground that the money had gone for the good of the Company, and had thus indirectly benefited the debenture holders. It was, in my opinion, from beginning to end, a plan to create, through a pretended sale to themselves that might make them apparent owners of the property, a mortgage or charge upon that property having priority over the rights of the debenture holders whom they were in duty bound to protect.

The part of the case as to which I entertain a doubt is the claim by the Bank as purchasers for value without notice. They are the legal owners of the whisky as it stands warehoused in the names of their trustees. But, as I have already stated, I hold that they had actual notice of the rights of the debenture holders; not constructive, but actual notice. In the present case notice to Whelan and Loudon, or either of them, was, in my opinion, notice to the Bank, for they were the agents of the Bank in this transaction, and even if they did not communicate all these material facts to their principals, as to which there is no sufficient evidence either way, they were acting with full authority to carry out the transaction, and in the course of that transaction they had express notice that there were debentures, and that these debentures prevented the Company from raising money by way of charge or mortgage in priority to the debentures. It is to be noted that it was not for the original advance of this money that this security

V.-C.
1895.

In re
OLD
BUSHMILLS
DISTILLERY
CO.;
Ex parte
BANK OF
IRELAND.

was required, but as further security for a pre-existing debt which it is evident they had some doubts as to the safety of. Under these circumstances the Bank may not have been so careful as they would be in case of an original advance. Mr. Loudon's statement that he would have renewed the bills without further security is not entitled to much weight after the previous statement of Mr. Whelan. But, however that may be, the question of notice remains the same, and it is this—Of what had the Bank notice? Can they maintain their claim on the ground that though they knew of the debentures and of their precluding any charge on or mortgage of the whisky, they did not know that the transaction was not really a sale in the ordinary course of business from Boyd and Connor, representing the Company, to themselves as private and ordinary purchasers? I feel bound to come to the conclusion, on the evidence, that they cannot. They must have known, or at least they would have ascertained if they inquired, that no money or security for money passed. The circumstances, in my opinion, made it incumbent on them to inquire. They must have known that Boyd and Connor were not in the whisky trade and that they were not partners in trade, but these circumstances may not in themselves be very material. They knew that Boyd and Connor were, from their position as directors, not at liberty to buy from themselves. But what appears to me to render these circumstances of minor importance is this, that I am satisfied upon the evidence that the Bank had notice that this entire transaction was a loan carried out by way of sale.

I shall therefore refuse the motion with costs.

D. M'C. M.

Appeal.
1896.
Jan. 13, 14, 15.

The Bank appealed.

The Solicitor-General (*Kenny, Q.C.*), and *Meredith, Q.C.* (with them *J. Herbert Shaw*), for the appellants.

Gordon, Q.C., and *J. H. Moore*, for the liquidator and receiver; and *Stanley, Q.C.*, and *Denning*, for the debenture holders, were not called upon.

The Court of Appeal (LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L.JJ.) affirmed the decision of the Vice-Chancellor, and dismissed the appeal with one set of costs.

Solicitors for Brydon & Co.: *O'Rorke & Son.*
Solicitor for the Bank of Ireland: *E. H. de Moleyns.*
Solicitor for the liquidator and receiver: *D. F. Spiller.*
Solicitors for George Johnston: *Crawford and Lockhart.*

G. Y. D.

BERGIN, Deceased.

LANGAN *v.* BERGIN.

(1892. No. 679.)

V.-C.
1895.
July 13.

Will—Codicil—Erroneous recital—Particular residue.

Testator, by a codicil, erroneously recited that he had already disposed of part of one portion of his property by his will, and gave the residue of this portion to a legatee:—

Held, that the entire of this portion passed to the legatee, and did not fall into the general residue.

Memorandum from the Chief Clerk, adjourned into Court to take the opinion of the Judge upon the question, whether certain moneys passed under a codicil to the testator's will to John Delahunt and Johanna Delahunt, or fell into the general residue.

Testator by a second codicil to his will dated 5th March, 1892, after devising certain fee-simple estates proceeded as follows:—"The sum standing in the Bank of Ireland, viz., £500 to my own credit on deposit receipt and such other sums as may be standing to my personal credit or deposit receipt as well as the sum or sums standing on like deposit in the National Bank, at the time of my death is to follow any disposition I have already made thereof. Anything over and above the money I already have disposed of, in respect of the said deposit receipts and interest thereon, I leave to my cousins John Delahunt and his sister Johanna Delahunt to distribute the same in such charities as may be in their judgment proper objects of charity in Ireland, at any time hereafter."

The Vice-Chancellor had ruled on a previous day that the codicil amounted to a disposition of a particular residue. The testator had not made any disposition of the moneys on deposit receipt which amounted to £2385.

There was no general residuary clause in the will or codicils.

V.-C.
1895.

LANGAN
v.
BERGIN.

Carton, Q.C., and *John Murray*, for the plaintiffs, the executors.

O'Connor, Q.C. and *Philip White*, for E. A. Bergin, a legatee and one of the next-of-kin :—

The effect of the codicil was to make the legacies given by the will primarily payable out of these moneys.

The testator having erroneously recited that he had already disposed of portion of this fund, the particular residuary bequest to the Delahunts fails and the entire falls into the general residue.

Serjeant Jellett, Q.C. and *Counsel* for John Delahunt and Johanna Delahunt :—

On the ruling of the Court already made, this must be deemed a disposition of a particular residue. There is no general residuary clause in the will, but according to the dictum of Hall, V.-C., in *Champney* v. *Davy* (1) that is a neutral fact. The language points to the fact that the testator thought he had made specific dispositions of part of the money on deposit in bank. This he had not done. The fact that he was under the impression that he had made such a disposition will not alter the case. An erroneous recital cannot be used on either side: *Dashwood* v. *Peyton* (2), *Langston* v. *Langston* (3), *Box* v. *Barrett* (4). The question between the particular residue and the general residue follows the same rule as that applied between a particular residue and the next-of-kin : Theobald on Wills, 4th ed. p. 192, *Champney* v. *Davy* (1), *De Trafford* v. *Tempest* (5), *Larking* v. *Larking* (6).

G. D. Keogh, for the Attorney-General, referred to *In re Margartson* (7).

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(1) 11 Ch. D. 949, 958.

(2) 18 Ves. 27.

(3) 21 Beav. 552.

(4) L. R. 3 Eq. 244.

(5) 21 Beav. 564.

(6) 37 Ch. Div. 310.

(7) 46 L. T. (N. S.) 807.

V.-C.
1895.

LANGAN
v.
BERGIN.

THE VICE-CHANCELLOR :—

The fund which I have now to deal with is the sum standing to the personal credit of the testator, or in his name on deposit receipt in the National Bank. He purports, by a second codicil to his will, to give this fund as a residue over and above what he had already disposed of in respect of the deposit receipts. There is nothing in the will or either of the codicils which can satisfy the words, "what I have already disposed of," and not a word to connect the pecuniary legacies in the will or codicils with this fund.

It would be going too far to hold that the words, "what I have already disposed of," in themselves amount to a gift of the general legacies out of this fund. I cannot separate the will and codicils; in law they are one, and the testator speaks of the disposition already made. I find no evidence of any intention either to dispose of this fund as a demonstrative legacy, or to make the legacies, previously given by the will or codicil, primarily payable out of it. A serious difficulty in adopting the construction contended for by the next-of-kin is the gross inadequacy of this fund for payment of the general legacies.

The result is, that the whole of this particular fund goes to the legatees named in the second codicil to distribute in such charities, in Ireland, as they think proper.

All parties to have their costs out of the general personal estate.

Solicitor for the plaintiffs: *Arthur Cullen.*
Solicitors for the defendant E. A. Bergin: *Casey & Clay.*
Solicitor for the Attorney-General: *George Collins.*
Solicitor for John and Johanna Delahunt: *W. J. Norris.*

T. H. M.

M. R.
1895.
Nov. 11.

IN RE STUBBS.

RUSSELL *v.* LEBERT AND OTHERS.

(1895. No. 680.)

Practice—Originating summons—Service out of the jurisdiction—Gen. Ord. XI., R. S. C. (Ireland), 1891*—Jurisdiction.*

By marriage settlement executed in Ireland landed property in Dublin was vested in trustees upon certain trusts. The settlement contained a power of appointment in favour of the children of the marriage. Personalty outside the jurisdiction subsequently became vested in the trustees, subject to the trusts and provisions of the settlement, and was, by deed poll executed in England, appointed by the husband and wife in favour of two of the children of the marriage. One of the trustees residing in Ireland brought an originating summons to have it determined whether the appointment was a valid exercise of the power or not. The other trustee, and all the children of the marriage whose addresses were known, were named as defendants. They all resided in England. The beneficiaries under the settlement applied to set aside an order giving liberty to issue and serve the originating summons on them in England:—

Held, that the Court had power to allow service out of the jurisdiction.

SUMMONS.

By a settlement, dated 17th April, 1861, and executed on the marriage of the Rev. Warden Stubbs and Jane Stubbs (then Jane Russell) certain hereditaments in the city of Dublin were vested in trustees upon trust after the said marriage for the separate use of Jane Stubbs for life, and after her decease for Warden Stubbs for life, and after the decease of the survivor for the use of the child or children of the marriage as Jane Stubbs should appoint, and in default of such appointment as Warden Stubbs should appoint, and in default of such appointment in trust for the child or children as therein provided; and in the event of there being no child living at the death of the survivor of the husband and wife, then upon trust for the appointees by will of Jane Stubbs, and in default thereof for her right heirs.

The settlement was executed in Dublin, and the only property thereby settled consisted of hereditaments in the city of Dublin. It gave a power to the trustees, with the consent of Warden Stubbs or his wife if she survived him, to sell the hereditaments and invest the proceeds in Government security or in certain other investments therein prescribed.

Under the provisions of the will of the Honorable Elizabeth Esther Russell and a decree of the Right Honorable the Master of the Rolls, dated 5th July, 1894, and the provisions of an indenture, dated 25th May, 1895, certain sums of £3000 3 per cent. Portuguese Bonds and 8700 dollars Alabama State Bonds, Class A, were vested in the Rev. John Digby Russell and the Rev. George Antonius Le Bert as trustees upon the trusts and with and subject to the powers and provisions declared and comprised by and in the settlement of the 17th April, 1861, in reference to the hereditaments thereby settled, including the power of investment, or as near thereto as the different nature of the moneys and securities would allow; but so that any child taking in default of appointment should take an absolute estate in the property coming to him or her, as was declared and provided by the said indenture of 25th May, 1895. The indenture of 25th May, 1895, was executed in England, and the bonds dealt with by it were in England.

By deed poll, dated 6th September, 1895 (executed in England), the Rev. Warden Stubbs and Jane Stubbs his wife, appointed that the Portuguese Bonds and Alabama State Bonds should go and belong to Mary Stubbs and Amy Stubbs (two of the children of the marriage) as part of their respective shares under the settlement of 1861, and to their respective executors, administrators, and assigns absolutely; and Jane Stubbs and the Rev. Warden Stubbs thereby surrendered their respective life interests in the said bonds to the use and intent that the said Mary Stubbs and Amy Stubbs should be entitled to the immediate transfer and delivery of the said bonds; and Jane Stubbs and the Rev. Warden Stubbs thereby requested the trustees of their marriage settlement to transfer and deliver the same bonds to the said Mary Stubbs and Amy Stubbs.

The Rev. John Digby Russell, as one of the trustees of the settlement of 1861, was willing to join in transferring the bonds as requested, provided that the Court of Chancery should consider the deed of appointment of 6th September, 1895, under the circumstances a valid and *bona fide* exercise of the power of appointment contained in the settlement, but no definite reply could be obtained by Mr. Russell's solicitors from Mr. Le Bert as to whether he was willing to join in handing over the bonds to the appointees; and he refused to join with Mr. Russell in issuing an originating summons to have the matter submitted to the decision of the Court.

Mr. Russell resided in Ireland. Mr. Le Bert in Lancashire in England. The Rev. Warden Stubbs and Mrs. Stubbs also resided out of the jurisdiction in Surrey, England. There were seven children issue of the marriage of Mr. and Mrs. Stubbs, five of whom were residing with their father and mother in England. The residence of the two others was not known to Mr. Russell or his advisers. All the children had attained the age of twenty-one years.

On 9th October, 1895, an application was made to the Vacation Judge on behalf of Mr. Russell for liberty to issue an originating summons in which he was named as plaintiff, and the Rev. Mr. Le Bert, the Rev. Warden Stubbs, Jane Stubbs, and five of the children of the marriage, as defendants, and serve same out of the jurisdiction of the said defendants.

By order, dated 9th October, 1895, the Lord Chief Justice (sitting as Vacation Judge) gave liberty to issue and serve the originating summons on the defendants out of the jurisdiction.

On Monday, November 11th, 1895, an application was made on summons to the Master of the Rolls on the part of the defendants, except the defendant Le Bert, that the order of 9th October, 1895, should be discharged so far as these defendants were concerned, and that the service of the originating summons upon these defendants and all subsequent proceedings (if any) therein might be set aside as against these defendants on the grounds, amongst others, that there was no jurisdiction in the Court to give leave to issue and serve an originating summons out of the jurisdiction, inasmuch as they were not domiciled or ordinarily resident within the jurisdiction, and were beneficially entitled to the money fund the subject-matter of the proceedings, and not as trustees.

J. W. Richards, in support of the application:—

The Court has no power to allow service out of the jurisdiction in this case. It does not come within any of the sub-sections of Order XI., Rule 1.

There are "no land or hereditaments situate within the jurisdiction" in reference to which a contract or obligation is sought to be enforced. The sole question arises as regards personal property. The case does not therefore come within sub-section (*b*). Neither, so far as the present applicants are concerned, does it come within sub-sect. (*d*), as they are "beneficiaries" and not "trustees." Neither is it within sub-sect. (*f*), for there has been no contract entered into within the jurisdiction which is sought to be enforced or affected. The trusts of the personal property in question are not referable to the marriage settlement of 1861, but they are referable to the provisions of the indenture of 25th May, 1895, which was executed outside the jurisdiction.

The Rule contains an exhaustive list of cases where service out of the jurisdiction will be allowed: *Re Eager* (1).

G. W. Walker, for the plaintiff:—

The order of the 9th October, 1895, allowing service out of the jurisdiction, was rightly made. The case comes within subsection (*b*) of Order XI., Rule 1. That sub-section applies once it is shown, as in this case, that there is land within the jurisdiction affected by the contract or obligation, even though no relief is asked in reference to it. See the observations of Palles, C. B., in *Attorney-General* v. *Drapers' Company* (2); *Winter* v. *Winter* (3).

The case also comes within sub-section (*f*). The contract, that is the marriage settlement of 1861, was executed in Ireland. The question is as to the power of appointment created by that settlement. The appointment must be incorporated into the instrument creating the power. It is, therefore, for the construction of the settlement that this originating summons is brought.

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(1) 22 Ch. Div. 86. (2) [1894] 1 Ir. R. 185. (3) [1894] 1 Ch. 421.

M. R.
1895.
RUSSELL
v.
LE BERT.

On the question of convenience there can be no controversy that an Irish Court is the proper tribunal to decide the question: *Harris* v. *Fleming* (1).

THE MASTER OF THE ROLLS:—

I am far from saying that the matter is clear; but the inclination of my mind is that the case does not come within sub-section (*b*) of Order XI., Rule 1, although portion of the property, subject to the settlement, consists of lands within the jurisdiction. No question arises as regards the contract, so far as it affects them. The present question is about personal property not within the jurisdiction. And although the Court of Appeal in the *Attorney-General* v. *The Drapers' Company* (2), held, as I had done, that sub-section (*b*) was not necessarily limited to actions in reference to lands situate within the jurisdiction, yet in that case the decree would have affected not only personal property outside the jurisdiction but also lands within it. Therefore, although I think the language used by the Lord Chief Baron might be interpreted as extending to a case like the present, yet the language used must be read in reference to the subject-matter, and I do not think that it was intended to decide that wherever there was land within the jurisdiction, even where no relief was asked for in reference to that land, the sub-section applies.

The question as regards sub-section (*f*) is not clear either. The words are: "the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in the action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction." In this case the marriage settlement, which created the power of appointment, was entered into within the jurisdiction, though the instrument executing that power was not made within the jurisdiction. It is a well-known rule of law that, generally speaking, a power is to be read into the instrument creating it. But the difficulty is whether the contract is one which is "sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in the action or for the breach whereof . . . relief is demanded." I rather think that it is a contract in reference to which relief is asked, and it was made within the jurisdiction. The originating summons is brought for the purpose of having the settlement construed by an authoritative decision of the Court, for the guidance of the parties. That, I think, may fairly be deemed to be either the enforcement of the contract, if not relief in respect of its breach, or it may be (though I have more doubt about this) that it is sought to be "affected" by the proceeding. My opinion, on the whole, is rather in favour of the view that there was jurisdiction to allow service out of the jurisdiction of this originating summons. I do not think that I ought to disturb the order of the Lord Chief Justice unless I had a clear opinion that it was wrongly made. It is desirable that the rules in reference to service out of the jurisdiction should be construed widely, and so as to make them applicable to a case like the present, clearly within the spirit of the rules, where there is a question of substance to be determined, which really ought to be, on analogy at least to the rest of the rules, submitted to the Irish Courts, and where no reason to the contrary, founded on convenience, has even been alleged. There is no doubt that if the present economical proceeding had not been adopted, and if a plenary suit had been brought, it could have been brought within the jurisdiction by a little arrangement of parties. I adopt this view also, having regard to the provisions of sub-section (*h*) which, by itself, does not apply to the present case, because there has been no person served within the jurisdiction; still the sub-section assists by analogy, because it is admitted that one defendant has been, or can be, regularly served, though not within the jurisdiction. There is here an Irish contract, trustees appointed in Ireland, and some of the property situate in Ireland. I shall make no rule on the present summons, reserving the question of costs.

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(1) 13 Ch. D. 208.

(2) [1894] 1 Ir. R. 185.

Solicitors for the plaintiffs: *R. & C. Walker.*

Solicitors for the defendant *cestui que trustent*: *Hayes & Son.*

R. W. L.

V.-C.
1895.
Dec. 5, 6.

Appeal.
1896.
Feb. 8, 11.

COLLINGS *v.* WADE.

(1893. No. 682.)

Trustee—Breach of trust—Improper investment—Extent of liability—Lapse of time—Action by cestui que trust—*Statute of Limitations—Interest on money lodged in Court to satisfy breach of trust during lifetime of tenant for life, who has acquiesced in breach of trust—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

By a settlement, executed on the 7th July, 1873, on the marriage of J. G. C. and E. M. C. (the plaintiff), of which E. F. W. and C. M. H. were trustees, the following property was put in settlement:—(1) a policy of insurance for £1000 on the life of J. G. C.; (2) two policies of insurance for £200 each on the life of J. L.; (3) six shares of £20 10*s.* in the Great Western Railway of Canada; and (4) a sum of £400 on deposit receipt in the Munster Bank at Cork. The property was settled upon trust for the plaintiff for life, with remainder to the children of the marriage, and the settlement contained a power to advance £400 out of the trust funds to the husband J. G. C. There were six children issue of the marriage. J. L. having died, a sum of £516, representing the two policies on his life, was paid to E. F. W. in April, 1877, and was lent by E. F. W. and C. M. H. to J. G. C. without security, and was lost. The £400 invested on deposit receipt in the Munster Bank was advanced to J. G. C. under the power. In 1879 E. F. W. retired from the trusteeship, and S. J. S. was appointed trustee in his stead. The trustees neglected to obtain a transfer of the Canadian Railway shares, which remained in the name of the plaintiff until 1884, when she transferred them to C. M. H. On the 1st March, 1884, C. M. H. sold these shares for £79 8*s.*, and appropriated the proceeds. J. G. C. died in 1895.

In an action brought by E. M. C. and the minor children against E. F. W., C. M. H., and S. J. S. to replace the trust fund and for an account, E. F. W. lodged £516 in Court, and pleaded the Statute of Limitations:—

Held, by the Vice-Chancellor, that E. F. W. was liable to pay interest at £4 per cent. on the sums of £516 and £79 to E. M. C during her life.

Held, on appeal (reversing the decision of the Vice-Chancellor), that, by virtue of the Trustee Act, 1888, s. 8, on E. F. W. lodging the £516 as he had done, and upon his paying the proceeds of sale of the Canadian Railway shares, in case of the default of C. M. H. so to do, no interest was payable to the plaintiff E. M. C. during her life, but that such interest was payable to the trustee E. F. W.

By a settlement dated the 7th July, 1873, executed on the marriage of John Gill Collings, and Eliza Maria Harvey, certain property consisting of (1), a policy of insurance for £1000 on the life of John Gill Collings (2), two policies of insurance for £200 each on the life of one John Lewis; (3), six shares of £20 10s. each in the Great Western Railway Company of Canada and (4) the sum of £400 invested upon deposit receipt in the Munster Bank, were vested in Charles Meade Harvey, and Edward Fry Wade (the trustees of the settlement) upon trust to hold the said six shares in the Great Western Railway Company of Canada in trust, to permit the said Eliza M. Harvey to receive the income thereof during her life for her sole and separate use without power of anticipation or alienation, and as to the several policies of insurance to hold the proceeds thereof after the receipt of the same upon trust to permit Eliza M. Harvey, in case she should be living at the time of the respective deaths of the said John Gill Collings and John Lewis (which event happened), to receive the income thereof during her life, but without power of anticipation, with other limitations not material to state, and after the death of the survivor of them, the said John Gill Collings and Eliza M. Harvey, in case there should be children of the marriage then living, upon trust as to all the property comprised in the said settlement and the income thereof, for the children, as J. G. Collings and E. M. Harvey should by deed appoint, and after the death of either of them, as the survivor should appoint, and in default of appointment in trust for the children equally, on attaining age, or if a daughter, on attaining age, or day of marriage, with further limitations not material to state.

The settlement contained a power to the trustees to sell and dispose of the shares in the Great Western Railway of Canada, and the other trust property, and to invest the proceeds, with the consent of the husband and wife, or the survivor of them, upon certain securities therein named, such as the trustees should with such consent deem prudent, with power to vary such investments, with such consent; and also a power to the trustees to lend to John Gill Collings any sum not exceeding £400, on his personal security.

There were six children, issue of the marriage, all of whom were minors.

The sum of £400, invested on deposit receipt in the Munster Bank, came to the hands of C. M. Harvey, and E. Fry Wade, and was by them lent to the said John Gill Collings, on his personal security, and become wholly lost.

John Lewis died on the 3rd August, 1875, and the sums payable under the aforesaid policies on his life, amounting to £516 6*s*. 6*d*., were, on the 10th April, 1877, paid to C. M. Harvey and E. Fry Wade, and by them lent to John Gill Collings, on worthless security, and had been lost.

By indenture dated the 28th January, 1879, Samuel John Skinner was appointed a trustee of the settlement of the 7th July, 1873, in place of Edward Fry Wade, who was desirous of retiring from the trusts of the settlement. C. M. Harvey and Samuel John Skinner had since acted as trustees of the settlement, and E. Fry Wade acted as solicitor.

John Gill Collings died on the 9th January, 1885, and £1080, representing the policy on his life was paid to Harvey and Skinner. The six shares in the Great Western Railway Company of Canada remained in the maiden name of Mrs. Collings after her marriage, and were transferred by her in 1884 to C. M. Harvey, who sold them for £79 8*s*., and the amount had been wholly lost. Application was made to Harvey and Skinner for an account of the trust money received, and of its state of investment, but no satisfactory answer was received, and an action was brought in July, 1893, by Eliza Maria Collings and her six children, against Wade, Harvey, and Skinner, for an account of the trust moneys.

By his defence, E. Fry Wade pleaded the Statute of Limitations to the breaches of trust complained of. The decree was made on the 10th November, 1894, directing an inquiry as to what had become of the trust property, and also an inquiry as to what portions of the trust property had been lost by breaches of trust by the trustees, and whether with the consent in writing, or at the request, of Mrs. Collings. It further declared that the loan of £400 to John Gill Collings was authorized by the settlement, and Edward Fry Wade submitting to lodge the sum of £516 6*s*. 6*d*. without prejudice to any right to contribution or indemnity against C. M. Harvey and Skinner, or against Mrs.

Collings or any interest she might have in the fund; it was ordered that he should lodge it in a month, and the Court reserved all questions as to liability to payment of interest till the present hearing on further consideration.

Kenny, *S. G.*, *Wright*, *Q.C.*, and *Sandford*, for the plaintiff.

Serjeant Jellett, *Q.C.*, and *Sugrue*, for the defendant Edward Fry Wade, cited *Thorne* v. *Heard* (1).

THE VICE CHANCELLOR:—

Dec. 6.

The first question which arises upon the 8th section of the Trustee Act, 1888, is whether this case comes within the exceptions following, that is—1, where the claim is founded upon any fraud or fraudulent breach of trust, to which the trustee was a party or privy; or 2, is to recover trust property or the proceeds thereof *still* retained by the trustee, or previously received by him and converted to his own use. The money as to which the question arises was received by the trustees on foot of certain policies of insurance, portion of the trust funds in the settlement, which was received by the trustees, Harvey and Wade, and by them lodged in a bank in their own names and afterwards lent by them, to John S. Collings on security not authorized by the settlement, and was altogether lost. The liability for the principal money is admitted, but there is a contention as to the interest chargeable against the defaulting trustees both as to the time from which it can be recovered, and as to the rate. This breach of trust was committed more than six years before the commencement of the action. All questions as to interest were by the judgment reserved for this hearing. The plaintiff Mrs. Collings, contends that the operation of the Act of 1888 is altogether excluded, as the case comes within one of the exceptions in the 8th section. I do not think it was a fraud or fraudulent breach of trust within the meaning of the 8th section. No doubt every breach of trust is an equitable fraud upon the *cestui que trust*, but this exception would be a nullity if the words received this large construction. To give them a reasonable operation, I think, they must be restricted to breaches of trust induced by some corrupt motive of personal gain or advantage to the trustee, or other element in the nature of moral fraud. Here the breach of trust was the lending the money to the husband on a security which was an improper investment and which by its failure led to a total loss. The trustees could not gain anything by the transaction, nor has any corrupt motive been imputed to them.

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(1) [1894] 1 Ch. 599.

Then it was contended that it came within the second exception as being property or the proceeds thereof, still retained by the trustees or previously received by them and converted by them to their own use. It certainly was not still retained by the trustees as the principal was all paid over to J. S. Collings long before this action was brought. It was trust property previously received by them, but was it converted by them to their own use? In my opinion it was not, for they paid it all over to John Collings, and derived no personal profit of any kind from the transaction so far as appears. If it had been applied in payment of their own debts or to recoup themselves for prior advances, or in any other way for their own benefit or advantage, they could not claim the benefit of the Statute. But in my opinion, it was not, in the view I take of these words, in any sense converted by the trustees to their own use. I therefore hold that, the statutory limitation does apply as between Mrs. Collings and the defendants, but of course it does not bar the rights of the infant children.

But then to what extent does it relieve the trustees? I am of opinion that it only bars the right of Mrs. Collings to recover more than six years arrears of the income prior to the commencement of the action. She sues for several gales of this income and to recover them in the shape of interest payable by the trustees on the capital money lost by their default. Each gale charged against them creates a separate cause of action, as would have been the case if the capital was still duly invested and the income had been received, but withheld by the trustees. If the trust had been to pay her an annuity for her life out of the income by periodical gales, the non-payment of each gale would in like manner have been a separate cause of action whether in an action of debt or a suit in equity. I therefore decide that she is entitled to recover for the six years next preceding the action.

V.-C.
1895.
COLLINGS
v.
WADE.

As the Court is not now limited by any express rule as to the rate of interest, I shall fix the rate at 4 per cent. as was done by me in the cases referred to, of *Hamilton* v. *Lane* (1) and *Farmer* v. *Lane* (2).

T. H. M.

Appeal.
1896.
Feb. 8, 11.

Edward Fry Wade appealed (3) from so much of the judgment of the Vice-Chancellor as directed him, in the event of C. M. Harvey not lodging the sum of £79 8*s*., and 4 per cent. interest thereon, from 1st day of March, 1884, to lodge same, and from so much of the said judgment as directed E. Fry Wade to pay interest on the sum of £516 6*s*. 6*d*., and that it might be adjudged that, during the life-time of the plaintiff Eliza Maria Collings, the said Edward Fry Wade was entitled to any dividends that have accrued, or might accrue on the securities representing the sum of £516 6*s*. 6*d*., so lodged by him.

Serjeant Jellett, Q.C., and *Sugrue*, for the appellant:—

The lapse of six years is now a complete defence to an action for a breach of trust by sect. 8, sub-sect. 1 of the Trustee Act of 1888, unless the case is within one of the exceptions mentioned: *Swain* v. *Bringeman* (4). That is, as against the tenant for life, although it furnishes no answer against the remainder-man. The fact that the tenant for life has received interest does not prevent the action being barred: *Want* v. *Campain* (5). The form of decree will be found in 3 Seton on Decrees (5th edition) 2, 127: *Somerset* v. *Poulett* (6). The exception in sect. 8 of the Trustee Act, 1888, as to property "still retained" by the trustee, does not apply here, and is confined to cases in which, at the date of the writ, the trustee actually has in his hands, or under his control, the trust property, or the proceeds of it, sought to be recovered: *Thorne* v. *Heard* (1).

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(1) 25 L. R. Ir. 188.

(2) Unreported.

(3) In the Court of Appeal, before FITZGIBBON, BARRY, and WALKER, L.JJ.

(4) [1891] 3 Ch. 233.

(5) 9 *Times'* Rep. 254.

(6) [1894] 1 Ch. 231.

The life estate of the tenant for life who has consented to the breach of trust can only be impounded where the tenant for life knows clearly that a breach of trust has been committed. But if the six years has elapsed, all claim against the trustee is at an end: *Mara* v. *Browne* (2).

Wright, *Q.C.* (with him *Kenny*, *S.-G.*, and *Sandford*), for Mrs. Collings:—

The Trustee Act of 1888 has in no way altered the principles which determine the time at which a cause of action for breach of trust, or concealed fraud, accrues. In equity, where a party conceals his fraud by paying interest on the money, the Statute of Limitations does not apply: *Blair* v. *Bromley* (3). It is the time when the breach of trust is discovered, and not the time when it is committed, from which the statute begin to run: *Gibbs* v. *Guild* (4); *Thorne* v. *Heard* (1). The application of the Lewis policies was either a fraudulent breach of trust to which Wade was party or privy, or it was a conversion of the fund to his own use.

Feb. 11.

FITZ GIBBON, L.J.:—

This action was brought by Eliza Maria Collings, *cestui que trust* for life, and her six infant children *cestuis que trustent* in remainder, under the marriage settlement of John Gill Collings and the plaintiff Eliza Maria Collings, dated July 7, 1873, against Edward Fry Wade, a former trustee, and Charles Meade Harvey and Samuel John Skinner, the existing trustees, for recovery of the trust property, for the removal of the existing trustees, and for the appointment of new trustees in their place. A decree to account was obtained in due course, the accounts were taken, and the present appeal is brought by the defendant Edward Fry Wade alone, against a portion of the decree upon further consideration which was made by the Vice-Chancellor on December 6, 1895.

The action was commenced on July 19, 1893. The appellant and Charles Meade Harvey were the original trustees,

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(1) [1894] 1 Ch. 599.
(2) [1895] 2 Ch. 69.
(3) 2 Ph. 354.
(4) 9 Q. B. Div. 59.

Appeal.
1896.
Collings
v.
Wade.
Fitz Gibbon,
L.J.

but the appellant retired, and Samuel John Skinner was appointed as a trustee in his place on January 28, 1879. The cases raises questions of importance as to the effect against Eliza Maria Collings of the Trustee Act, 1888 (51 & 52 Vict. c. 59, s. 8). These questions, however, relate only to two portions of the trust property, and to the rights of Eliza Maria Collings as tenant for life. The entire principal of the trust funds has been either accounted for, or recovered, or ordered to be replaced by the trustees who are responsible for it, and the rights of the children are not now disputed. The trust funds originally consisted of (1), a policy of insurance for £1000 upon the life of John Gill Collings, the amount of which was received on June 25, 1885, by Charles Meade Harvey and Samuel John Skinner, who were then the trustees, and the appellant, who had previously retired from the trust, is under no liability as to this; (2), two policies for £200 each on the life of John Lewis, upon which a sum of £515 6*s.* 6*d.* was paid to Charles Meade Harvey and Edward Fry Wade on April 10, 1877; (3), six shares of £20 10*s.* each in the Great Western Railway of Canada, which, at the date of the settlement, stood in the name of Eliza Maria Collings, then Eliza Maria Harvey spinster; and, (4), a sum of £400, which was at the date of the settlement invested on deposit receipt in the Munster Bank, in the names of Charles Meade Harvey and Edward Fry Wade, but was afterwards lent by them to John Gill Collings, and lost. The trusts were to permit Eliza Maria Collings to receive the income of the trust funds during her life, without power of anticipation, and after her death, in the events which have happened, to hold the principal in trust for her children. Power was given to the trustees to sell the railway shares and to invest the proceeds and the other trust funds on certain securities. Power was also given to them to lend to John Gill Collings any sum not exceeding £400, on his bond, note, bill, or other security to be approved of by the trustees. The loan of the £400 secured by the deposit receipt was authorised by this power, and it is conceded that the trustees are not liable for the loss of that sum.

The Lewis policies and the railway shares are, therefore, the only funds with which we have to deal. John Lewis died in 1875, and the then trustees, Harvey and Wade, received £516 6*s.* 6*d.*

under the policies. They lent this sum in 1877, without security, to John Gill Collings; it was applied in reduction of an overdraft due by him to a Bank, for which it is alleged that the trustees were liable to the Bank as his sureties. They subsequently took from him, as a security for the amount, a mortgage on a farm in Wiltshire; but this was afterwards evicted or surrendered, and the money was lost, more than six years before the commencement of the action. The trustees neglected to obtain a transfer of the railway shares from Eliza Maria Collings, and the shares remained in her name until 1884, when she transferred them to Harvey alone, and on March 1, 1884, he sold them for £79 8*s.* which he received. Harvey is said to be insolvent, and he has not defended the action. The neglect to obtain a transfer of the railway shares was a breach of trust on the part of Edward Fry Wade; but, as he retired from the trusteeship in 1879, his liability for this breach of trust accrued more than six years before the action.

If the Trustee Act, 1888, section 8, applies, the Statute of Limitations affords a complete defence to Wade as against Eliza Maria Collings, but it affords no defence against the children, because sub-section 1 (*b*) provides that the statute "shall not begin to run against any beneficiary, unless and until the interest of such beneficiary shall be an interest in possession." The decree orders Harvey to bring in the £79 8*s.* with interest, within a month; and on his default orders Wade and Skinner, within a month from service of notice of the default, to bring in "the said sum of £79 8*s.* and interest thereon at £4 per cent. from March 1, 1884, to the date of lodgment." Wade has already brought in £516 6*s.* 6*d.* to replace the amount of the Lewis policies, for which he is admittedly liable to the children.

We have now to decide whether the Trustee Act, 1888, sect. 8, enables Wade to plead the statute against Eliza Maria Collings, and whether she can sustain a claim against Wade for any income upon the £79 8*s.* or the £516 6*s.* 6*d.*, either for arrears, or as the produce of money lodged by him in Court to replace the trust funds for which he is liable.

Sect. 8, sub-sect. 1, is as follows:—"In any action . . . against a trustee . . . , except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or

Appeal.
1896.

Collings
v.
Wade.

Fitz Gibbon,
L. J.

privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—(*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner, and to the like extent, as they would have been enjoyed in such action if the trustee . . . had not been a trustee."

The first question is whether the case as to the £516 6*s.* 6*d.* comes within this exception. The Vice-Chancellor held, and we think rightly, that it does not. Fraud was not charged in the pleadings, nor alleged before the Vice-Chancellor. In this Court, for the first time, the Solicitor-General attempted to make out that, owing to the suretyship of the trustees, the application of the proceeds of the Lewis policies, by John Gill Collings, in reduction of his debt to the Bank, was either a fraudulent breach of trust to which Wade was party or privy, or was a conversion of the fund to Wade's use. But in our opinion the charge of fraud is not open to the plaintiff, and even if it were, there is no evidence to sustain it. Fraud, within the meaning of the Act, we think, must amount to dishonesty. The evidence goes no farther than to show that the money was lent to John Gill Collings in breach of trust. The trustees lost it, but they did not apply it to their own use. If we held this to be a fraudulent breach of trust, it would be difficult to say that any unauthorised loan was not equally so, and the use made of the money by the borrower, to pay his own debt, cannot be made a constructive conversion of the money by the trustees to their own use, merely because they were sureties for the debt. Upon the construction and effect of the exception, therefore, we agree with the Vice-Chancellor.

But a second question arises upon sub-section (2), which is in these terms :—

"No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order, obtained by another beneficiary, than he could have obtained if he had brought such action, and this section had been pleaded."

Upon the facts and dates, if the Lewis policies and the railway shares had been held upon trust for Eliza Maria Collings abso-

Fitz Gibbon, L.J.

lutely, as the exception in sub-section (1) would not apply, Wade would have had a good defence against her, and could have pleaded the section, if the action had been brought by her alone. The Vice-Chancellor has held, however, that the section "only bars the right of Mrs. Collings to recover more than six years' arrears of the income, prior to the commencement of the action," and that "each gale charged against the trustees creates a separate cause of action, as would have been the case if the capital was still duly invested, and the income had been received, but withheld, by the trustees." We cannot concur in this view. It appears to us that any defence which would have prevailed against her as regards the whole fund, if she had been the absolute beneficiary, or as regards the income, if she had been the sole plaintiff, must equally prevail to prevent her from recovering anything for herself from Wade, when she sues as co-plaintiff with her children. In other words, her whole claim is barred as against Wade. Furthermore, we think that each gale of interest cannot be treated as creating a fresh cause of action against a trustee without taking away the very relief which the section expressly gave. It could not be so treated, if the defendant were not a trustee; and the Act says that he is to have the same protection from the Statute of Limitations as if he "had not been a trustee." But then it is said that the trust fund is now replaced, and that the income of it must therefore be paid to the tenant for life pursuant to the trust. It has not been replaced, so far as Eliza Maria Collings is concerned; and Wade has a defence to any action for its replacement which she could bring against him. He not only had not the trust money in his hands, but he has been obliged to replace it with his own money, in order to meet the unbarred claim of the children. Under such circumstances, we regard the lodgment of the money in Court by Wade, as nothing more than a proceeding to *secure* the fund, so that it shall be forthcoming, when required to meet the claim of the children. When it is invested, which it must be, for security, this can neither accelerate the right of the children to receive the income, nor can it confer that right upon their mother, when she could not have enforced it for herself, if she had sued alone. To give it to her would be contrary to the express words of sub-sect. (2), for she would thereby derive a greater benefit from the judgment obtained by her children, than she could have obtained if she had brought the action alone. It follows that the income of whatever money is replaced by Wade must be paid to him during the life of Eliza Maria Collings. It is uncertain, as yet, whether he will have to bring in all or any part of the £79 8*s*., but he has already brought in the £516 6*s*. 6*d*. Accordingly, we must discharge so much of the order of the Vice-Chancellor as orders the defendant, Edward Fry Wade, to lodge interest on the sum of £79 8*s*., at the rate of £4 per cent. per annum, from the 1st March, 1884, until date of lodgment; and also so much of the same order as declares that the defendant, Edward Fry Wade, is liable to pay to the plaintiff Eliza Maria Collings, interest on the sum of £516 6*s*. 6*d*,, at the rate of £4 per cent. per annum, from the 1st July, 1887, being six years before the commencement of this action, to the 8th December, 1894, being the date of the lodgment of said sum in Court by him," and in lieu thereof we must declare that, inasmuch as the said defendant Edward Fry Wade, has a good defence to this action in respect of the income, during her life, as well of the said sum of £79 8*s*., as also of the said sum of £516 6*s*. 6*d*., against the plaintiff Eliza Maria Collings, under the Trustee Act, 1888, sect. 8, if the said defendant, Edward Fry Wade, shall lodge in Court the said sum of £79 8*s*., or any part thereof, pursuant to the order of the Vice-Chancellor of December 6, 1895, the amount so lodged by him, and also, in any event, the sum of £516 6*s*. 6*d*., already lodged by him in Court, shall be invested in Government 2¾ per cent. Consols, in the name of the Accountant-General, and to the credit of this action; and that the dividends and income of the said sums, when invested, which shall accrue during the lifetime of the said Eliza Maria Collings, shall be paid to the said Edward Fry Wade, and his executors or administrators, or his or their attorney, thereto lawfully authorized, and that the principal of the said sums and the investments thereof shall, from and after the death of the said Eliza Maria Collings, be held and applied upon the trusts of the indenture of settlement of July 7th, 1873, for the benefit of the plaintiffs, other than the said Eliza Maria Collings, being the persons beneficially entitled thereto under the said settlement.

By an unfortunate oversight, the authorities bearing upon the questions argued were not cited before the Vice-Chancellor, and he does not refer to them in his judgment. But while we have given our own view of the effect of the Trustee Act, 1888, sect. 8, independently, it is to be observed that this view is entirely supported by *Swain* v. *Bringeman* (1); *Want* v. *Campain* (2); *Thorne* v. *Heard* (3); and *Somerset* v. *Earl Poulett* (4); and that a precedent for our decree is to be found in Seton's Decrees, vol. iii., p. 2127.

Liberty will be given to the persons interested to apply in the Court of the Vice-Chancellor, after the death of the plaintiff Eliza Maria Collings, for payment out of Court of so much if any of the sum of £79 8*s*., as may be lodged by the defendant Edward Fry Wade, and of the sum of £516 6*s*. 6*d*., which has already been lodged by him, or any investments representing the said sums, as they may be advised, and the lodgment and payment schedules to the Vice-Chancellor's decree will be modified so as to carry out our order, and to direct the payment of the dividends accruing during the life of the plaintiff, Eliza Maria Collings, to the defendant, Edward Fry Wade, upon the sums lodged by him. The appellant, Edward Fry Wade, will be declared entitled to his costs of the appeal against the plaintiff Eliza Maria Collings; but we cannot interfere with his liability to pay the costs awarded against him by the Vice-Chancellor, as he was rightly made answerable to those costs in respect of the rights of the minor plaintiffs and their next friend. The Vice-Chancellor's decree, save so far as it is varied by our order, will stand affirmed. With this order, the action will be remitted to the Vice-Chancellor to proceed therein as to justice shall appertain.

BARRY, L.J., concurred.

WALKER, L.J.:—

Edward Fry Wade by this appeal, while admitting his liability to the infant remaindermen, disputes his liability to pay any interest to the tenant for life on the ground that she is barred by the Trustee Act, 1888, sect. 8, from recovering anything in respect of his breach of trust, and he also seeks an adjudication that he is during the life of Mrs. Collings entitled to receive the dividends on the fund representing the £516 6*s.* 6*d.*, principal money brought in by him, and such portion of the £79 8*s.* as may be lodged by him.

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(1) [1891] 3 Ch. 233.
(2) 9 *Times'* Rep. 254.
(3) [1894] 1 Ch. 599.
(4) *Ibid.* 231.

Mr. Wade contends that Mrs. Collings, the tenant for life, is by sect. 8, sub-sect. 2, of the Trustee Act, 1888, put in the same position as if she were the sole plaintiff. I am clearly of opinion that this is so, just as much as if she were entitled to and sued for the whole principal, and the sub-section was introduced for the very purpose of meeting the case of the joinder of one against whom the statute had run with others against whom it furnished no bar.

The first question is, does the case fall within the exceptions? The claim is not founded on a fraud or fraudulent breach of trust. On this appeal it was suggested that there were letters written by Wade which amounted to misrepresentations sufficient to bring the case within *Blair* v. *Bromley* (1), and that the right of action occurred only on the discovery of the fraud. No such case was made in pleading or proof, and it is inconsistent with the certificate and the Vice-Chancellor's judgment, and the mode in which the money was brought in by Wade, and the reservation of rights in respect of interest; and I cannot see if the question were open that there was any fraud or fraudulent breach of trust. He lent, or was party to lending, the £516 6*s.* 6*d.* to the husband, just as the £400 was under authority lent, and he became liable for the consequences as for a breach of trust, consummate when the loan was made. The £79 8*s.* is of course free from any such suggestion.

Next it was contended that the claim was for trust property, still retained by the trustee, or previously received by him and converted to his own use. Wade parted with the money long since, and he certainly had it not at the date of the action, unless in the sense that every trustee who has wrongfully parted with trust money ought to have it—a conclusion which would nullify the section. Nor has he converted it to his own use, or to pay-

(1) 2 Ph. 354.

ment of any debt of his. It went to the husband for the husband's debts, and Wade derived no personal profit from the transaction.

The Vice-Chancellor, on this part of the case, decides entirely in favour of Wade; for he says, after analysing the exceptions—"I therefore hold that the statutory limitation does apply as between Mrs. Collings and the defendants." But then the Vice-Chancellor declares Mrs. Collings entitled to recover six years' arrears of interest against the trustees, treating each gale as a separate cause of action, "as would have been the case"—I use his words—"if the capital was still duly invested, and the income had been received but withheld by the trustees;" and he then likens the case to a trust to pay her an annuity out of the income by periodical payments.

I think this loses sight of the scope of the section. I think its effect was to free the trustee from all claims in respect of the life estate of Mrs. Collings, who is one of the claimants in respect of the breach of trust. Her life estate has not been replaced by the bringing in of the principal. It has been brought in to be available for production to the remaindermen when their rights accrue in possession, and by way of security. It is their rights to have the money, which alone are saved by the Act.

But the cases decided on the section seem to me conclusive on the question, and I cannot help thinking that the decision of the Vice-Chancellor would have been different, if he had the same assistance which has been given to us.

The case of *Swain* v. *Bringeman* (1), in the Court of Appeal, expressly decided that time runs from the breach of trust committed.

Want v. *Campain* (2), before Wright, J., decides the very point involved in this appeal. There a trustee, in 1877, advanced £400 on a second mortgage under circumstances which made it a breach of trust. An action was brought more than six years after by the tenant for life and remaindermen, and the judge, after holding that time ran against the tenant for life, notwithstanding the receipt of interest, went on to decide that she could not be benefited by the decision in favour of the remaindermen, and that in result the fund should be paid into

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(1) [1891] 3 Ch. 233. (2) 9 *Times'* Rep. 254.

Appeal.
1896.
COLLINGS
v.
WADE.
Walker, L.J.

Court, and the income paid to the executor of the defaulting trustee till the death of the tenant for life. The judgment is given in 3 Seton on Decrees, 2127.

The case of *In re Somerset* (1) is to the same effect. It was held there that the tenant for life, barred under the section, could derive no personal benefit from the sum which the trustee might have to make good and bring in.

Lord Justice Davey says:—"The result will be that Mr. Vere Somerset will be entitled to receive the income of the funds realised from the security" (that is the actual proceeds of the mortgage wrongfully taken), "but the trustees will retain for their own use the interest of the money paid by them to make good the deficiency of the mortgage."

The case of *Thorne* v. *Heard* (2) is useful as negativing the application to the case of *Blair* v. *Bromley* (3), and showing the meaning of the exception in the section "still retained." Lindley, L.J., says:—"The word 'still' refers to the commencement of the action, and the use of the word is important. A trustee may be liable to make good trust money with interest, as if it were still in his hands, and yet he may not in fact have it. But in construing this statute we have to ascertain whether in fact the trust property sought to be recovered is 'still retained' by the trustee. That question ought to be answered in the affirmative, if he, or any agent for him, has it, so that he can get it; but in the negative if it has been lost, whether by negligence or otherwise. The second exception applies to, and is confined to, cases in which, at the date of the writ, the trustee still retains—that is, has in his hands, or under his control—the trust property or the proceeds thereof sought to be recovered."

I think the questions arising on this appeal are closed by the authority of the cases referred to, and that the judgment must be varied in the manner sought by the notice of appeal.

Solicitor for the plaintiff: *G. L. Goold.*
Solicitor for the defendant Wade: *Justin M'Carthy.*
Solicitors for the defendant Skinner: *H. Harte Barry & Son.*

R. D. M.

(1) [1894] 1 Ch. 231. (2) [1894] 1 Ch. 599. (3) 2 Ph. 354.

M. R.
1896.
Feb. 10.
Appeal.
March 10.

IN RE THOMPSON AND M'WILLIAMS' CONTRACT.

Vendor and purchaser—Powers of administrator durante minore ætate—*Sale of leaseholds.*

An administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate, if it is necessary in due course of administration, although not necessary for payment of debts.

The assets of a deceased person consisted of a public-house, held under lease for a term of thirty-one years, of which ten years were unexpired, subject to a rent of £30 per annum. The lease contained a covenant against subletting, and the reversion had been purchased by a rival publican, who refused to renew at the expiration of the lease. The administrator *durante minore ætate* was an elderly man, who had no knowledge of the publican's business, and the persons beneficially entitled to the assets were two minors who required an advance of money. The public-house had been let at a rent of £120 a-year, but this tenancy had been determined as being a breach of covenant:—

Held, by the Court of Appeal (FitzGibbon and Walker, L.JJ.), reversing the decision of the Master of the Rolls, that the administrator *durante minore ætate* had power to sell, and that the purchaser was not entitled to a statement that he was selling for the purpose of payment of debts.

SUMMONS under the Vendor and Purchaser Act.

The premises, the subject of the contract for sale, consisted of a public-house, No. 172, Newtownards-road, Belfast. They were formerly three houses, 154, 156 and 158, Newtownards-road, and were held under lease dated the 20th September, 1875, from James Gregg to John Joseph Hoey for thirty-one years from the 1st May, 1875, at the rent of £30. The lease contained a covenant against assignment and sub-letting without the consent of the lessor in writing.

On the 19th October, 1882, the lessee died leaving a widow and three children, Mary, Josephine, and John Joseph. Mary the eldest child died in 1890.

On the 12th March, 1883, letters of administration of the estate of John Joseph Hoey were granted to Mrs. Hoey. She died on the 12th September, 1888, leaving part of the estate unadministered, and on the 20th September, 1889, letters of administration *durante minore ætate* were granted to James Thompson the vendor. By deed dated the 20th September, 1889, James Thompson let the premises to Thomas M'Cann for three years from the 1st August, 1889, at the rent of £120 a-year; and by a deed endorsed on the said lease dated the 9th May, 1890, James Thompson extended the said term for the period of five years. The consent in writing of the head landlord to this sub-lease had not been obtained.

On the 4th July, 1895, an agreement was entered into between James Thompson and John M'Williams for the sale of the interest in the public-house for £1150, the purchase to be completed on the 1st November, 1895. John M'Williams died on the 29th October, 1895, and probate of his will was granted on the 13th January, 1896, to Catherine M'Williams and Bernard Malone, the executors. On the 25th October, 1895, Thomas M'Cann surrendered the interest in the sub-lease of the public-house to James Thompson.

After the abstract of title had been delivered, the solicitor for the purchasers required from the vendor evidence that the sale was had for the payment of the debts of John Joseph Hoey. This the vendor declined to give, and from the correspondence it appeared that in addition to the short period of the tenure of the house, the principal purpose of the sale was to provide some money for the use of the minors, the elder of whom was about eighteen years old, and was about to enter a convent, and £70 was required for her outfit. The younger minor, John Hoey, was fifteen years old, and it was proposed to apprentice him to a trade. There were no other assets of John Joseph Hoey, except this public-house.

There remained only ten years' interest in the lease to run, and it was stated by counsel that the reversion expectant on the determination of the lease had been purchased by a rival publican, who refused to extend the term of the lease, or to renew it on its expiration.

James Thompson the administrator *durante minore ætate* was an elderly man about seventy years of age, who had no knowledge or experience of the business of a publican. He resided in the

M. R.
1896.

In re
THOMPSON &
M'WILLIAMS'
CONTRACT.

county of Antrim, twenty miles from Belfast, and was illiterate.

The present summons was taken out by James Thompson, for a declaration that the objections to the title had been sufficiently answered and that a good title to sell had been made out.

Whitaker, for the vendor.

Carton, *Q.C.*, and *M'Ilroy*, for the purchasers.

THE MASTER OF THE ROLLS :—

The question in this case arises as regards the title to a lease made in 1875, to John Hoey for a term of thirty-one years, which expires in 1906, of premises consisting of a public-house and plot of ground. The lessee died in 1882, intestate. He left three children surviving. One has since died. The two who are still living are minors, the eldest now aged eighteen and a-half years and the younger fifteen. Originally letters of administration to John Hoey's estate were granted to his widow. She afterwards died, and in September, 1889, letters of administration as regards the estate unadministered were granted to James Thompson. These letters were granted *durante minore ætate.* Thompson as such administrator *de bonis non durante minore ætate* entered into a contract—which is the subject of the present proceeding—with John M'Williams, who has since died. The contract was dated 4th July, 1895, and was of an informal character, and there might be some difficulty in its construction, were it not that the parties understood, and it is admitted, that the agreement is to be taken as a contract to dispose of the interest in the lease. The contract was by M'Williams in his lifetime to purchase the premises and a deposit of £300 was paid on foot thereof. In making title Thompson the vendor answered the requisitions of the executors of M'Williams in a way which has given rise to the present summons. The question is, has he, as vendor, shown a title which he can force on the purchaser. The difficulty is that he is administrator to one who died so long ago and that he is only administrator *durante minore ætate.* The fact of his being only administrator *de bonis non* does not affect the question. There is no statement as to there being debts of the deceased unpaid. As to the circumstances under which the sale has been entered into, the case made is contained in the tenth paragraph of the affidavit of the vendor's solicitor. He says, "There are at present two minors who are interested in the estate of the said John Joseph Hoey, deceased, viz.:—Josephine Hoey, now aged eighteen years and seven months and John Joseph Hoey now aged fifteen years, the third minor Mary Hoey, having died in or about the month of October, 1890, at Beziers, France. The said Josephine Hoey has determined to enter the Convent of the Sacred Heart, and for this purpose she entered on her novitiate in the head convent of the community at Beziers, France, in the month of September, 1895, and the sum of £70 is required for the purchase of an outfit, while the said John Joseph Hoey is at such an age that money will be required for his advancement for purposes of a trade, and it is in their interest that this sale should be carried out, as from inquiries I have made, I am satisfied that the highest price which can b obtained has been offered for the premises." Those are th reasons the administrator gives for selling. He says—1, the is a sum of £70 required for an outfit of Josephine Hoey, who is entering a convent; and 2, there is, or will be something needed for the advancement of the boy of fifteen. The affidavit does not state that there are not sufficient funds, apart from the leasehold interest, to provide these moderate amounts. It does not state, as was suggested, without evidence, at the bar, that a rival publican has purchased the reversion of the property and that it would be impossible to get an extension of the lease for the benefit of the minors. There is no evidence whatever of any such thing. The question then is, has an administrator *durante minore ætate*, power to sell under these circumstances? Has he clear power to sell, so that he can force an unwilling purchaser to complete the contract for sale?

On this question there are, practically, two cases, one decided in 1879, and the other in 1880. That of 1879 is a decision of the Vice-Chancellor (1) on the very point under consideration, and in that case it appears that there was no evidence that the sale was necessary for the payment of debts; and it was held that the title

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(1) *In re Robinson and Sords*, 3 L. R. I. 429.

M. R.
1896.
In re THOMPSON & M'WILLIAMS' CONTRACT.

could not be forced on the purchaser. The decision of the Vice-Chancellor was founded on the passage in Williams on Executors, referring to Bacon's Abridgment. The Vice-Chancellor says, "I cannot get over these authorities by the decision of *Monsell* v. *Armstrong* (1), for the facts of that case show that the question now raised was not before Lord Romilly. The object of the sale there was to pay off the mortgage debt, and therefore it was necessary that the power of sale should be exercised; and the question was, whether a power of sale given by the testator to his executors or administrators could be exercised by an administrator *durante minore ætate*. But there it was necessary to have the sale to pay off a debt, and a sale for that purpose is within the power of such administrator. On the whole, though I cannot say, without doubt, I must hold that the administrator here has not authority to sell the term under the circumstances, and I must rule against the vendor, and make him pay the costs of this proceeding." How does that differ from the present case if it be not for the suggestion, without proof, that here it may possibly be for the benefit of the minors that the sale should take place?

In the next year a similar question came before Jessel, M.R. (2) The same passage, in Williams, was referred to in the argument, and some of the authorities were cited and discussed. The judgment of the Master of the Rolls is short. He says: "The question in this case is raised by reason of some obscure *dicta* in some musty old law books about the power of an administrator *durante minore ætate*." There is no reference to the decision of the Irish Vice-Chancellor. It was evidently not cited, as having regard to the dates it could hardly deserve the epithet of "musty." "The limit," he says, "to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him. I am of opinion that he clearly can sell for the purpose of paying the debts. In this case there is no doubt of there being debts, and there is no allegation that he sold for any other purpose. Then it is said that the sale is not beneficial. That may be so. It sometimes is not beneficial for a man to pay his debts."

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(1) L. R. 14 Eq 423. (2) *In re Cope; Cope* v. *Cope*, 16 Ch. D. 49.

That case turns on circumstances different from the present. The intestate died in 1875. Letters of administration were granted in 1876. The contract was made in 1880. It was admitted that there were debts due. This differentiates it from the present case and from that before the Vice-Chancellor. No doubt there were strong expressions used as to the power of an administrator *durante minore ætate*, but they must be understood in reference to the circumstances of the case before the Master of the Rolls. On the facts it is not an authority in point in favour of Mr. Whitaker's contention, though on the principle enunciated in general terms by the Master of the Rolls no doubt it is in his favour. The question then is, What ought I to do? If the case before the Vice-Chancellor had been cited before Jessel, M.R., and he had discussed and overruled it, it would probably be my duty to follow the more recent decision arrived at after mature consideration of the previous case. As it is, I think I am not only at liberty to decline to follow the principle of the decision in England if it does not commend itself to my own mind, but bound by the decision of the Vice-Chancellor on the very point. On the merits my opinion goes with the Vice-Chancellor in the present case. The dates show that there cannot be any debts outstanding. Then it is said that the sale, which might be otherwise unjustifiable, is justified by the circumstances of the estate of the deceased. Even if I am at liberty to inquire into that, I am not, as matter of fact, satisfied that it is necessary for the benefit of the minors that the contract should be carried out: There is nothing to show me that the sale is necessary, or even desirable, so as to require the administrator to part with the property of these minors. And if I am left in that state of mind, what is a purchaser to do who has no opportunity of seeing what is the case made as to the necessity for, or propriety of, the sale, or of hearing the arguments of counsel? Is he to decide at his peril?

I do not think that it is proved that the sale is needed or necessary in the due course of administration, and the whole ground of the vendor's case fails. Even if the matter were more favourable to the contention of the vendor, and I thought that it

M. R.
1896.
In re
THOMPSON &
M'WILLIAMS'
CONTRACT.

was shown that it would in all probability be for the benefit of the minors that the contract should be carried out, the decision of the Vice-Chancellor, if I follow it, shows that the title in this case is one which ought not to be forced on the purchaser. On attaining age the minors might give the purchaser trouble—if it turned out (as it well might) to be their interest to claim their own property *in specie.*

It is unnecessary to go inte the question as regards the clause in the lease restraining subletting. It is clear that there has been a breach of the covenant, which would have empowered the landlord to treat it as a forfeiture. But the landlord has not intervened, and it is said that his reversion is gone. It is probable that the fear in respect to that point is chimerical.

On the other grounds I think that the vendor has not shown title.

R. W. L.

Appeal.
1896.
March 10.

The vendor appealed (1). Further evidence was given before the Court of Appeal, by affidavit, as to the necessity of the sale being had, and as to the purchase of the reversion by a rival trader.

Gordon, *Q.C.*, and *Whitaker*, for the appellant:—

An administrator *durante minore ætate* has the same powers as an ordinary administrator, save that he is limited in point of time: *Cope* v. *Cope* (2). In that case the sale was for payment of debts. But an ordinary administrator is bound to protect the assets, and to do all things necessary to prevent the estate being wasted. So the executor has an absolute power of disposition: Williams on Executors (8th ed.), p. 497, Note C.; *Prince's Case* (3).

This is especially the case with *bona peritura*, or in the case of assets of a burdensome description, such as shares on which a call may be made: Williams on Executors, p. 801. A power of sale given by a testator to his executors may be exercised by an administrator *durante minore ætate*: *Monsell* v. *Armstrong* (4);

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(1) In the Court of Appeal, before FITZGIBBON and WALKER, L.JJ.

(2) 16 Ch. D. 49.

(3) 5 Rep. 29 (*b*).

(4) L. R. 14 Eq. 423.

Re Ryan and Cavanagh's Contract (1). All the circumstances here show that a sale was absolutely necessary. The term of the lease had only ten years to run; the vendor knew nothing about the business; he was a man advanced in years, who lived a long way off, and was illiterate. The administrator could not get a transfer of the license to himself.

M'Ilroy (with him *Carton, Q.C.*), for the respondent:—

There is no necessity for a sale, because there was a profit rent of £90 a-year. The cases cited do not apply, because they were all sales for the payment of debts. From *Prince's Case* (2) down to the present, no case can be found as an authority for this. *Re Robinson and Sords' Contract* (3) is an authority in our favour. When a point of law is raised for the first time, the title should not be forced on a purchaser: *Re Venn and Furze's Contract* (4).

FITZ GIBBON, L. J.:—

This case comes before us on appeal from an order of the Master of the Rolls, made on a summons under the Vendor and Purchaser Act, in which the vendor asked for a declaration that the requisitions and objections of the executors of the purchaser in respect of the title had been sufficiently answered, and also for a special declaration that the vendor, James Thompson, as an administrator of John Joseph Hoey, *durante minore ætate*, had shown a good title to sell the premises comprised in the contract of sale. The Master of the Rolls was of opinion that the vendor, as an administrator *durante minore ætate*, under the circumstances of the case, had not power to sell, and he made an order against the vendor, and ordered him to pay the costs. A further affidavit has since been made by the vendor, for the purpose of showing that, in any view of the matter, a sale is necessary for the due administration of the estate. There are a few small requisitions and objections which have not been yet dealt with, though the vendor had practically undertaken to satisfy them. But the appeal has been really taken, and the case has been argued, on the

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(1) 17 L. R. Ir. 42.
(2) 5 Rep. 29 (*b*).
(3) 3 L. R. Ir. 429.
(4) [1894] 2 Ch. 101.

Appeal. 1896.

In re THOMPSON & M'WILLIAMS' CONTRACT.

Fitz Gibbon, L.J.

larger question of the power of the limited administrator *durante minore ætate* to sell a chattel real without showing debts to be outstanding. On the smaller points, we must take care that the purchaser gets all that he is entitled to get. It was said that because all the objections had not been answered, we must decide against the vendor. We cannot take that view against a vendor who has offered to comply with these small requisitions, but whose title has been refused on a broad ground going behind them all. We shall make it a condition of his getting the order that the vendor shall carry out his undertaking as to the small points which remain open, but we decide the main question in his favour. There is no direct authority upon it. The facts are simple. The property consists of a public-house, held under a lease for a term of thirty-one years, of which ten years are unexpired; the lease contains a covenant against sub-letting. The original lessee died in 1882, and the property passed to his widow and administratrix. She died in 1888, leaving two minor children. The present vendor, an uncle, then obtained letters of administration *durante minore ætate* of the children. The elder child, a daughter aged about eighteen years, has entered a religious establishment in France, and requires money to pay for her necessary outfit. The younger is a son aged about sixteen years, for whom it is considered necessary to raise a sum of money to advance him in life, or to apprentice him to a suitable trade or business. The administrator is an old man, illiterate, living at a distance, and both unable and unfit to carry on the business of the public-house.

We must, of course, deal with the case according to law, and, subject to the limited administration, the property is in the minors, but, upon the facts, the case made for a sale is as strong as it well can be. The administrator *durante minore ætate* is charged with the administration of a wasting property, which can neither be kept nor managed, and which must either be lost or sold.

Let us first take the case of an ordinary administrator. He would be liable for any loss that might occur to assets of an onerous or perishable description, if he failed either to use reasonable diligence to preserve them, or, if necessary, to sell them. It would be a breach of trust, in the view of a Court of

Equity, if he used the assets to carry on a precarious trade, and he would be liable for any loss occasioned by his attempting to do so. *Prima facie*, an ordinary administrator would have authority to sell the public-house as a going concern, and the purchaser from him would be safe, at least unless he had notice that the sale was unnecessary or improper. To test the power of a limited administrator under similar circumstances, I ask—What is the foundation of the authority of a personal representative? The most ordinary power of an administrator is to sell for the payment of debts, but that is not his only power, and selling assets for the payment of debts is only one of the duties incidental to the due administration of the assets generally. The sale, even in that case, is an accident, and neither is it a necessary incident, nor are the debts the real foundation of the administrator's power. The very words of the letters of administration, and of the administration bond, whether the letters are general or limited, show the duty of the administrator to extend to the collection, management, realization, and disposition of the assets in "a due course of administration." In this case, I think it is pretty clear that there are no debts to be paid, but it is the duty of the administrator to sell this public-house all the same. Take a very common case. An administrator finds himself the holder of some onerous investment not permitted for trustees, such as shares not paid up in a Limited Company. What is he to do with them? If he keeps them, and a call is made, he has no right to pay the call out of other assets; even if no call is made, he will be charged in equity for any loss sustained through retaining an unauthorised security. Debts or no debts, "due administration" involves getting rid of property of that sort. But we need not go to analogy, for the prompt realization of *bona peritura* is the express duty of every personal representative. How is this duty less incumbent on a limited than on a general administrator. The perishing of the assets cannot be arrested, *durante minore ætate*.

In the present case the sale is made doubly imperative by the facts. For we have a valuable trade existing in licensed premises, the lease of which has only ten years to run, and is subject to a heavy rent. A rival trader has bought the reversion.

Appeal.
1896.

In re THOMPSON & M'WILLIAMS' CONTRACT.

Fitz Gibbon, L.J.

The administrator is incapable of carrying on the trade, even if he had power to do so, which he has not. He has been offered £1180 for the place, as a going concern. An ordinary administrator would not only have power to sell, but would be bound to sell. We have only to consider whether the administrator *durante minore ætate* differs, in either power or duty, from an ordinary administrator, where an Act necessary for due administration of the assets is concerned, and must be done, if at all, during the currency of the limited administration. Although in *Cope* v. *Cope* (1) there were debts to be paid, and, therefore, a sale for the payment of debts would have been a proper exercise of the administrator's duty, Sir George Jessel puts his judgment on no such narrow ground. He says that the limit to the administration is, no doubt, the minority, but in all other respects, he is an ordinary administrator. It may be that the burden of proving the necessity for an immediate sale on other grounds, where there are no debts, would be thrown on a limited administrator, but that it would be presumed in the case of an ordinary administrator. But here the necessity is clear, and when the duty to sell in due course of administration is shown, the power of an administrator *durante minore ætate* is no less, either in quantity or quality, that that of an ordinary administrator. In Williams on Executors the power of realizing *bona peritura* is stated to be one of his powers; the power to realize onerous or unauthorized assets must, on the same ground, be another. The authority of the limited administrator is temporary, and comes to an end, but, so long as it lasts, it carries with it the duty and the power of dealing with the assets as any other personal representative ought to do. We therefore think that, in this case, the administrator *durante minore ætate* can make title to sell this leasehold public-house as a going concern.

We do not direct any inquiry whether the sale is for the benefit of the minors, because we are satisfied that it is necessary for the due administration of the assets, in the only way in which the administrator can administer them without incurring a personal liability which, in this case, he is incompetent to

(1) 16 Ch. D. 49.

discharge, and which he is not, in any case, bound to undertake.

We have authority to make a declaration which will prevent the minors from giving trouble hereafter. We shall declare, on reading the additional affidavit, that it is necessary for the due administration of the assets that James Thompson should sell the premises in the contract for sale mentioned, and that a good title to sell has been shown, subject to the completion by the vendor of the undertaking to answer the requisitions of the purchasers, Nos. 3, 4, and 6, which he offered, before the summons was issued, and which he is still willing, to fulfil.

As regards costs, we think it desirable not to discourage vendors or purchasers from bringing questions up for decision in this summary way. We shall, therefore, let each party bear his own costs in the Court below, but we cannot exonerate the respondent from the responsibility of paying the costs of the appeal.

Walker, L.J.:—

I do not desire to add anything save upon the main question, viz. whether the title offered by the administrator *durante minore ætate* is a good one. It may be that such an administrator is not, for all purposes, even while the minority continues, in the same position as an ordinary one, still I think that he has, in this case, shown a good title.

There are, no doubt, cases where, in a proceeding under the Vendor and Purchaser Act, the Court has refused to make an order in favour of the vendor on the ground that the title was too doubtful. The case which I had in my mind during the argument was *New Land Development Association and Gray* (1), where Chitty, J., says, on this ground, "Plainly, there is every probability of litigation ensuing against this purchaser if he completes his purchase, 'a reasonable, decent, probability of litigation,' as Baron Alderson has called it. The trustee in bankrupcy would not be bound by any decision on this summons, indeed, he has emphati-

(1) [1892] 2 Ch. 138.

Appeal. 1896.

In re THOMPSON & M'WILLIAMS' CONTRACT.

Walker, L.J.

cally declined to be bound by these proceedings, and if I were to decide in favour of the vendors, I should be compelling the purchaser to bring a law suit." The title there was held bad on the merits also, and the Court of Appeal affirmed the decision. As a general rule the Court is, I think, bound to act on its own view, and we are bound, I think, to do so in the present one. I express no opinion as to whether some observations of Sir George Jessel, in *Cope* v. *Cope* (1), may not appear to go too far, or some of those used by the Vice-Chancellor in *Re Robinson and Sords' Contract* (2), may not appear to put a too restricted limit on the powers of the administrator *durante minore ætate*. The Master of the Rolls, in the present case, considered himself, to a great extent, bound by the decision of the Vice-Chancellor. In my opinion it is here shown that the intended sale was for the due and necessary administration of the estate, and within the power of such an administrator.

There is some ambiguity in the manner in which his powers are defined in text writers of authority, perhaps arising from the decision in *Prince's Case* (3). It is said in Com. Dig. Administration F. :—" An administrator during the minority of one entitled to administration has, for the time, all the power and authority of an absolute administrator." It is afterwards said he may assign a term of years, but apparently for payment of debts : so in Bacon's Abridgement, Exor. and Admor., adopted in Williams on Executors, " though he has no interest or benefit in the testator or intestate's estate but in right of the infant, yet he may do all acts which are incumbent on an executor, and which are for the advantage of the infant and estate of the deceased." There is express authority that he can sell a term for payment of debts. This follows from *Monsell* v. *Armstrong* (4), *Re Robinson and Sords' Contract* (2), *Cope* v. *Cope* (1).

This last was a case of a sale for debts, but Sir George Jessel expressly says, that the only limit on him is a limit of time. " He is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way, and the

(1) 16 Ch. D. 49.

(2) 3 L. R. Ir. 429.

(3) 5 Rep. 29 (*b*).

(4) L. R. 14 Eq. 423.

property vests in him," and this would also appear to be the opinion of Sir J. Romilly.

In the case in this country before the Vice-Chancellor, there was no evidence that the sale was necessary for the due administration of the estate of the deceased, and the facts, when gone into, suggested the contrary. It may well be, and I assume, that as the grant of administration was made for the benefit of the infant, the purchaser is entitled to evidence that the sale is being made for payment of debts, or otherwise for the due administration of the estate, and that it would not be sufficient for the vendor to throw down the letters of administration and say I will answer no questions.

Here certain facts appeared on the title, and answers to the requisitions which showed a sale necessary. The property was a public-house, with a license attached, held under a lease for ten years unexpired. There was a covenant to keep up the license, and a covenant against sub-letting without consent in writing. There was no power to carry on the trade, unless it were obtained from the Court of Chancery.

A sub-lease had been made for a term expiring in 1897, at a profit rent of £90 per annum, but no consent had been given to it, and in law it was void, and the facts show that no ratification of it could be procured, as a rival publican had bought the reversion. The contract bears date the 4th July, 1895, and on the 25th October, 1895, a surrender of the sub-lease was made, thus giving up possession at all events. The sale appears, in point of price, to be a beneficial one.

The purchaser's solicitor required it to be shown that the sale was made for payment of debts, and the reply was, "you are not concerned to inquire whether debts are due or not, as no presumption can arise as against an administrator during the time that has elapsed from the death of the intestate; apart from this, you are aware the administrator has no power to carry on trade, and must dispose of the premises, more especially where, as in this case, the term is so short."

The facts appear more fully in the affidavit filed for the purpose of the appeal. The admission that a sale may be made for debts involves, I think, that it may be made for any purpose of due administration and realization of the estate. What is an administrator to do who cannot trade and cannot sublet? If the license is lost there is a breach of covenant, and the house becomes valueless, and if the trade is not carried on, the license probably would not be renewed.

The circumstances of the property seem to me to involve a trust to realize the property. Suppose the intestate were the assignee of an onerous lease, would it not be the duty of the administrator to realize it, or get rid of it? I think the special facts of the case show that the sale is in due administration, and for the benefit of the infant's estate, and that no matter upon which side the *onus* to show that is cast, good title is here shown in this administrator.

I concur in the order as to costs.

Solicitor for the vendor: *Joseph Macauley.*
Solicitor for the purchaser: *E. Kennnedy*

R. D. M.

DUFFIELD *v.* M'MASTER.

M. R.
1895.
Nov. 27.

Lease accompanied by loan of money—Proviso for reduction of rent—Option of purchase—Specific devise of demised premises—Residuary estate—Realty or personalty.

A made a lease for years of certain premises to B, containing a proviso that the rent thereby reserved was to be reduced on the exercise of an option given to B, his executors, administrators, and assigns, of purchasing it for £350. A sum of £350 was advanced by A to B, to enable him to put buildings on the demised premises, in pursuance of a building covenant contained in the lease; and by deed of covenant of the same date as the lease B bound himself, his heirs and personal representatives, to pay off the £350 within six years. In default of such payment there was a power of sale given to A and his representatives; and it was provided that until this sum was paid the rent of the premises should be the original amount reserved by the lease. Many years afterwards A by his will specifically devised the demised premises to his son G, and after certain other dispositions devised the residue and remainder of his property to trustees upon certain trusts. At the time of his death A was the owner in fee of the demised premises. After the death of A the person in

whom the interest of B was then vested paid the sum of £350 to the administratrix of A :—

***Held*, that the sum of £350 passed under the specific devise of the demised premises to G, contained in A's will, and not under the devise of his residuary estate.**

Motion.

By indenture of lease dated 24th October, 1835, Maxwell M'Master demised and granted unto Thomas Halahan, his executors, administrators, and assigns, certain premises in Rathgar-road in the parish of Rathfarnham and county of Dublin, to have and to hold the said granted and demised premises unto Thomas Halahan, his executors, administrators, and assigns, for the term of 120 years at the yearly rent of £28 10*s*. By said lease it was provided and agreed between the parties as follows, viz. :—" That when and so soon as pursuant to the provisoes and agreements contained and provided in and by a certain indenture bearing equal date and collateral with these presents, made and executed by and between the said Thomas Halahan of the one part and the said Maxwell M'Master of the other part, the said Thomas Halahan, his executors, administrators, or assigns, shall pay or satisfy to the said Maxwell M'Master, his heirs, executors, administrators, or assigns, the sum of £350 sterling that then and from henceforth the payment of £21 sterling yearly, a portion of the yearly rent hereby reserved shall cease and determine, and that from henceforth the premises hereby demised shall be subject only to the remainder of the rent hereby reserved being a sum of £7 10*s*. sterling." The lease also contained a covenant by Thomas Halahan to expend a sum of £150 within four months, and a further sum of £350, making £500 at least, in building as therein mentioned. By another indenture of lease also dated 24th October, 1835, Maxwell M'Master demised other adjoining premises to Halahan for a similar term of years at a like rent of £28 10*s*, reducible in like manner to £7 10*s*. on payment of £350, and with a like covenant to expend sums of £150 and £350 in building.

By a deed of covenant also dated 24th October, 1835, Thomas Halahan covenanted, promised, and agreed with Maxwell M'Master, his heirs, executors, administrators, and assigns, that he the said Thomas Halahan, his heirs, executors, administrators, or assigns, at his or their proper costs and charges, would, before the 1st May then next, lay out and expend in building as therein specified the sum of £300, that is to say, the two several sums of £150 in said indentures of lease respectively mentioned, making together the sum of £300 over and above the sum of £700, that is to say the two several sums of £350 each in the said indentures of lease also mentioned, which said two several sums of £350 making together the said sum of £700 were intended and agreed to be lent and advanced by the said Maxwell M'Master for erecting, building, and finishing upon the two demised pieces of ground and premises two good dwelling-houses as therein mentioned; and Maxwell M'Master thereby covenanted to advance the said sum of £700 in certain instalments as therein provided. The deed contained a covenant by Thomas Halahan for repayment to Maxwell M'Master, his heirs, executors, administrators, or assigns of the said two sums of £350 each within six years from the 1st May then next; and there was a power of sale in default of repayment as therein mentioned. Two houses were subsequently erected on the two plots of ground demised by the respective leases, the two sums of £350 having been advanced by Mr. M'Master to Mr. Halahan.

By his will dated 12th May, 1863, Maxwell M'Master gave, devised and bequeathed unto his son George M'Master, his heirs, executors, administrators, and assigns, all the lands and hereditaments, messuages, and premises, of and to which he was seized, possessed, or entitled, situate on the west side of Rathgar-road in the county of Dublin, "held by leases from Lieutenant-Colonel De Montmorency and others," together with all buildings, &c., thereon, "subject to the payment of the rents and the various covenants, clauses, and agreements reserved by and contained in the said leases," and subject to two annuities thereinafter mentioned. The testator devised other property to Alexander Parker and John Houghton as trustees upon certain trusts; and as to the residue and remainder of his property he directed them to divide it into five equal parts, and to pay, assign, and transfer two-fifths thereof to his son George, and to invest the remaining three-fifths, and to hold the money so invested in trust for Isabella Duffield for life for her sole and separate use, with remainder over as therein provided.

By a codicil to his will, dated 8th December, 1864, testator revoked the absolute devise to his son George of the lands and premises situate on the west side of Rathgar-road, and thereby gave, devised, and bequeathed to Alexander Parker and John Houghton, their heirs, executors, administrators, and assigns, "the said lands, tenements, and hereditaments, messuages, and premises so situate on the west side of Rathgar-road in the county of Dublin, in said will described as being held by leases from Lieutenant-Colonel De Montmorency, and others, but which I hold under a fee-farm grant thereof, together with all buildings, erections, rights, members, privileges, and appurtenances, upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual produce thereof, respectively, to my said son George M'Master, and his assigns, during his natural life, or until he shall become and be declared bankrupt, or until he shall become an insolvent and seek the benefit of any Act for the relief of insolvent debtors." On such decease, bankruptcy, or insolvency, the testator devised to the trustees upon trust to pay the rents, &c., to Eliza M'Master, otherwise Boyle, for life, with certain remainders over as therein provided. The testator subsequently made another codicil to his will, the contents of which are not material.

Maxwell M'Master died on 24th January, 1867. The trustees and executors named in the will having renounced probate thereof, letters of administration with the will and codicils annexed were on 19th June, 1867, granted to the petitioner, Isabella Duffield, and proceedings having been instituted for the administration of the trusts of the will and codicils a decretal order was made dated 9th July, 1868.

The interest of Thomas Halahan in the premises situate on the west side of Rathgar-road demised by the first-mentioned lease of 1835 became vested in Alexander Ogilvie. The sum of £350 advanced to Thomas Halahan for the purpose of erecting buildings on these premises and secured by the deed of covenant was not paid to Maxwell M'Master during his life, and no steps were taken by him to enforce payment thereof. After his death notice of intention to pay off the same was given by Alexander Ogilvie, and the said sum was paid by him to Isabella Duffield as administratrix of Maxwell M'Master; and by indenture dated 11th May, 1894, the yearly rent payable under said first-mentioned lease was reduced from £28 10*s.* to £7 10*s.* The said sum of £350 was invested by Isabella Duffield in the purchase of £108 16*s.* 9*d.* Bank of Ireland stock. On November 27th, 1895, an application was made by Isabella Duffield to the Court for a declaration whether the sum of £350 received from Alexander Ogilvie was to be regarded as part of the testator's residuary personal estate, or whether the said sum was to be regarded as capital moneys and subject to the trusts in the testator's will declared of the land in respect of which same was paid.

Brady, for Isabella Duffield:—

The sum of £350 paid by Mr. Ogilvie forms part of the residuary personal estate of the testator and is not portion of the *corpus* of the real estate. It passes under the devise of the residuary estate contained in the will of the testator and not under the devise in the codicil. Where there is an option given to a lessee to purchase lands, which option is exercised after the death of the lessor, though the rents, until the exercise of the option, belong to the heir, once it is exercised conversion takes place and the purchase-money becomes personal estate: *Lawes* v. *Bennett* (1); *Townley* v. *Bedell* (2); *Weeding* v. *Weeding* (3); *Ripley* v. *Waterworth* (4). And where there was a lease for lives renewable for ever, with a proviso that the lessee, his heirs, or assigns, might wipe out the rent reserved on payment of a specified sum, it was held that when that sum was paid after the death of the lessor it was personalty: *Re Crofton* (5).

Littledale and *O'Connor Morris*, for George M'Master:—

This being the case of a will and not of intestacy *Re Crofton* (5) does not apply. In *Lawes* v. *Bennett* (1) the will was in very general terms, and the rule adopted there does not apply to a case where the terms of the will are special, and where there is specific mention of the lands which are subject to the option: *Drant* v. *Vause* (1). In *Emuss* v. *Smith* (2) the effect of both these cases is discussed, and the principle of *Drant* v. *Vause* (1) followed; and see judgment of Page Wood, V.-C., in *Weeding* v. *Weeding* (3) at page 431.

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(1) 1 Cox, 167.
(2) 14 Ves. 591.
(3) 1 J. & H. 424.
(4) 7 Ves. 425.
(5) 1 Ir. Eq. R. 204.

The principle of *Lawes* v. *Bennett* (4) is not to be extended, and will only be applied to a case precisely parallel: see the observations of Lord Eldon in *Townley* v. *Bedell* (5), and in *Daniels* v. *Davison* (6); *Edwards* v. *West* (7). In *Weeding* v. *Weeding* (3) the will in question was made before the agreement giving an option of purchase. Here the contract was made long previous to the will; and it must be taken that all the circumstances of the case were present to the testator's mind when his will was made; and the specific devise of the premises on the west side of Rathgar-road shows an intention that the devisee, George M'Master, is to have the full benefit of all his (testator's) interest in the property, including the £350: Coote on Mortgages (1884), 1122; and see *Weeding* v. *Weeding* (3). The question is one of intention; and the facts of this case show that the testator considered the money impressed with the character of the land which he devises specifically, with full knowledge of the contract affecting it: *Noys* v. *Mordaunt* (8) (Finch's Pre. Ch. 265). [Counsel also cited *Woodhouse* v. *Meredith* (9).]

THE MASTER OF THE ROLLS:—

The case has been extremely well argued on both sides; all the authorities have been cited. The facts are not in dispute. Mr. M'Master being the owner of certain leasehold interests in Rathgar-road, he made a lease of the premises to Mr. Halahan for 120 years, and so far as the lease itself is concerned there is nothing on the face of it to show any collateral transaction. But the rent was liable to be fined down by the tenant by means of an exercise of option to purchase it for £350, the rent being otherwise treated as an ordinary rent issuing out of leasehold lands. Mr. M'Master, at the time of this transaction, himself held as lessee under Colonel De Montmorency, but his tenure would appear to have been renewed from time to time, and it was ultimately converted, probably under the Renewable Leasehold Conversion Act, because when he came to make his will (a great number of years afterwards) he described himself as owner in fee. The transaction, however, was not in fact confined to the lease of 1835, because on the same day on which the lease was made there was a deed of covenant entered into, which was applicable both to that lease and to another lease of adjoining premises, by the same lessor to the same lessee. From that deed of covenant it appears that a sum of £700 was advanced by M'Master to Halahan for the purpose of enabling him to put buildings on the premises demised by the two leases in pursuance of building covenants in the leases, and so secure the rent; and he bound himself to pay off the £700 within six years, and till it was so paid the rent was to be the originally larger amount, which was to be reduced to the smaller sum to which the premises were respectively to be thereafter subject. Substantially that transaction looks very like a mortgage; but it is not in form a mortgage. A mortgage being a pledge of property can only be given by an actual assignment, or by some equitable agreement to assign or deposit, which would be tantamount to assignment in this Court. But the £700 was a loan in the first instance, for the covenant is for the repayment of the £700; and I may say in passing that the terms used in these instruments are rather loose as regards "heirs" and "executors." The strongest argument in favour of holding that this money was to be personal estate, so far as the form of the instrument is concerned, is to be gathered from the proviso at the end of the deed of covenant; but the words of limitation are loosely used, and too much reliance cannot be placed on that. In substance it was intended that there should be two separate transactions—a lease and a loan of money, with provision for its repayment—and if the matter rested simply in that way, and M'Master the lessor had died intestate, there would be good ground for holding that Mr. Brady's argument should prevail, and that the £350 received from Mr. Ogilvie in respect of the premises vested in him as lessee, should be dealt with as personal estate.

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(1) 1 Y. & C. 580.
(2) 2 De G. & Sm. 722.
(3) 1 J. & H. 424, at p. 431.
(4) 1 Cox, 167.
(5) 14 Ves. 591.
(6) 16 Ves. 249.
(7) 7 Ch. Div. 858.
(8) 2 Vern. 581.
(9) 1 Mer. 450.

In *Re Crofton* (1), a case decided in this Court by Sir Michael O'Loghlen, though the facts do not fully appear, I gather that there was no question as regards the terms of the deed in the case, and the question was simply between the real and personal representatives arising in a minor matter in reference to a contract of sale. The facts are not very fully set out, and the judgment is singularly concise; but it appears that there was an option given to a lessee to purchase the rent reserved out of freehold premises, and it was exercised after the death of the lessor. It was held that the sum was personalty and did not go to the heir. That was a case of intestacy, and was decided on the authority of *Lawes* v. *Bennett* (2); *Townley* v. *Bedwell* (3); and *Ripley* v. *Waterworth* (4). The Master of the Rolls thought those cases in principle decided the case before him. He says, " When the matter of this petition was moved some time ago, I looked into the cases then cited, and found that they sustained the application." That is the whole of the judgment. That case was decided in this Court. The decision is of course binding on me, and I should have to follow it if the facts of the case before me are similar and are brought within the same rule. But in this case there was a covenant to pay money within six years which was broken; and there does not seem to have been any pressure in consequence put on the lessee by the lessor who appears to have been satisfied with the larger rent reserved. He made his will in 1863, the codicil is dated 8th December, 1864, and he died in 1867. Therefore from 1835 to 1867—a period of thirty-two years—things were allowed to go on in this way with his knowledge, and the £350 was never called in. If he had died intestate *Re Crofton* (1) would be a binding authority on the question, because the option of purchase on the face of the lease and on the face of the deed of covenant appears undistinguishable in principle from the option in *Re Crofton* (1). The option to purchase a particular part of a rent-

(1) 1 Ir. Eq. R. 204.
(2) 1 Cox, 167.
(3) 14 Ves. 590.
(4) 7 Ves. 425.

charge, and the option to buy part of a reversion would follow the principle applicable to the whole of the estate. But it is said the fact of the will makes a difference, and that question depends on the terms of the will. I think that contention is correct, because there is no doubt that the owner of an estate subject to an option to purchase may deal with it in any way he likes, and treat it either as real or personal estate. The will devises this property specifically to one of the testator's sons. So far as that disposition extends it was revoked by the codicil on which the rights of the parties depend:—"I hereby give, devise, and bequeath unto the said Alexander Parker and John Houghton, their heirs, executors, administrators, and assigns the said lands, tenements, hereditaments, messuages, and premises so situate on the west side of Rathgar-road, in the county of Dublin, in said will described as being held by leases from Lieutenant-Colonel De Montmorency and others, but which I hold under fee-farm grant thereof, together with all buildings, erections, rights, members, privileges, and appurtenances therein or thereto belonging upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual produce thereof respectively, to my said son George M'Master and his assigns during his natural life, or until he shall become bankrupt, &c." The only question is whether those words cover the £350 or not; because even if I am right in holding that in the case of intestacy it would have gone to the personal representatives, the question is what has the testator done, and whether under the gift of his estate and interest in Rathgar-road the £350 passes, or whether it is excluded and passes under the residuary gift, which is the alternative construction. The testator knew of the arrangement as to the £350; and he knew also that this sum was not secured by mortgage on the lands, but that it was so far thrown into the lands that the security, in so far as it was a security, was a rentcharge issuing out of the whole of the lands subject to the lease. Moreover he lived thirty-two years after the making of the lease, and never did anything to separate the £350 from the lands. That circumstance is not conclusive. But this is clear that the arrangement or option in reference to the £350 was made long antecedent to the will and codicil. The will was made with full knowledge of all the circumstances connected with the £350; and generally speaking a will must be construed with reference to the state of things existing at its date and known to the testator (subject, of course, to the rule embodied in the 24th section of the Wills Act).

Take the case of an ordinary option of purchase, not complicated by two separate instruments or blended with rent into one homogeneous rentcharge, but the case of an ordinary optional contract to purchase. What is the law in reference to it? Mr. Brady refers to a case based on the principle of *Lawes* v. *Bennett* (1). *Lawes* v. *Bennett* (1) has been often referred to, with more or less qualified approval, but it is impossible to say that it has ever been overruled. It has been always recognised as a binding authority wherever it applies. But it is one of the cases which is usually mentioned for the purpose of being distinguished from other cases where the facts justify such a course. The will in that case did not specifically deal with the property—that is not in express terms. The Master of the Rolls said, "Although this case may be new in species, yet the principles upon which it seems to me to depend are perfectly clear and are so well-established in this Court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwronge, for that is expressed in very general terms. He had two species of property, one of which he gives to Bennett, the other to Bennett and his sister. Then which kind of property is the present? It is very clear, that if a man seized of a real estate contract to sell it and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal," and he decides that it is personal property. The principle of that case no doubt might easily have been extended so as to apply to cases where there was a will. But very soon afterwards the question did arise as to whether *Lawes* v. *Bennett* (1) should be extended to cases where there was definite disposition of property by will, and it was always held that the decision should be limited to cases where there was no specific disposition of the property made after the date of the contract giving the option of purchase. In

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(1) 1 Cox, 167.

M. R.
1896.
DUFFIELD
v.
M'MASTER.

Drant v. *Vause* (1) the premises were held under a lease for years and the lessees had an option to purchase the fee-simple of the demised lands. After the lease had been granted, the owner made a will specifically devising the lands, and after the testator's death the lessees elected to purchase. The two cases on which *Re Crofton* (2) was decided were relied on in support of the contention that the purchase money must be considered as forming part of the residue instead of being subject to the limitations declared by the will concerning the lands. Vice-Chancellor Knight Bruce in giving judgment said that in *Lawes* v. *Bennett* (3) the will was expressed in general terms, and Lord Kenyon, at the commencement of his judgment, adverted to that circumstance. "Here," he says, "the will was in very special terms" (that is only as specifically referring to the lands), "without therefore meaning to suggest the slightest doubt as to the soundness of the decision in *Lawes* v. *Bennett* (3) his Honor was of opinion, that the testator having, in the present case, made specific mention in his will of the estate which had been previously the subject of the lease, the general rule established by the authorities did not apply; but that the purchase-moneys were subject to the same limitations as had been declared concerning the estate itself." That decision distinguishes *Lawes* v. *Bennett* (3), without questioning its authority, on the ground that in that case the language of the devise was only general, whereas the language in the case before the Court was specific. *Drant* v. *Vause* (1), as was admitted by Mr. Brady, is very much in point. But it was contended that it was inconsistent with some of the other authorities that have been cited. In *Weeding* v. *Weeding* (4) there was an option of purchase which did not exist at the date of the will: and therefore it was held that there was a sort of partial revocation of the will by subsequent conversion of the property. The Vice-Chancellor says, "Conceiving the principle to be settled by the authorities I have mentioned, the only question is, whether the case falls within the exception recognised by the cases of *Drant* v. *Vause* (1) and *Emuss* v. *Smith* (5). I understand the principle on which those cases were decided to be this:—When you find that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both the authorities relied on, for, in one, the contract was before the will, and, in the other, the same effect was produced by the subsequent republication of the will. But the case is very different when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees, and his personalty to other persons. After that, a part of the estate ceases to be Kentish Town estate, and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known when he had entered into the contract, that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is, that he meant his property to go according to the state to which it would be reduced by the exercise of that option," and accordingly he so held. But it is obvious that the circumstance making that decision inapplicable to the present case is that here the option existed before the codicil was executed, and, therefore, in my opinion, *Drant* v. *Vause* (1) applies, and *Weeding* v. *Weeding* (2) has no application, even if this case were in other respects identical, and that would be enough for the decision of the case. But it occurs to me the whole question is as to what is the intention of the testator in his will, and, I think, that the words and general conveyancing terms are wide enough to comprise the £350, if it were an interest in land at all, and it is a stronger case than that, because the mode in which the £350 is blended in the land, and the separation of the lease and the deed of covenant, not taking security by assignment or anything of the sort, but creating one uniform rentcharge, raised a stronger presumption that the testator intended to deal with all the interest he had in the premises including the £350. I, therefore, think it passes under the devise in the codicil, and does not pass under the devise of the residuary estate.

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(1) 1 Y. & C. 580.
(2) 1 Ir. Eq. R. 204.
(3) 1 Cox, 167.
(4) 1 J. & H. 424.
(5) 2 De G. & Sm. 722.

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(1) 1 Y. & C. 580.

(2) 1 J. & H. 424.

Solicitors for Isabella Duffy: *Richardson & Synnott.*
Solicitor for George M'Master: *James A. Denny.*

R. W. L.

In the Matter of LYONS and CARROLL'S CONTRACT, and in the Matter of THE VENDOR AND PURCHASER ACT, 1874.

V.-C.
1895.
Nov. 6, 18.

Appeal.
Dec. 8, 9, 20.

Vendor and purchaser—Conditions of sale—Title—Will—Gift by implication —Release of testamentary power—Derogating from grant—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Return of deposit.*

By his will, dated May 25, 1875, a testator devised premises, to which he was entitled in remainder in fee simple expectant on the determination of a life estate, subject to that life estate, to his four sisters (one of whom was the vendor) as their sole and separate property, and provided that in the event of any of his sisters dying, her share should be divided among the survivors; and by a codicil to his said will he directed that each of his said four sisters should have power to leave by will amongst any child or children they might have, any property they might derive under his said will or codicil, and that in default of issue or such will same should revert to the survivors.

One of the four sisters predeceased the tenant for life, leaving issue, but without having made any will.

After the death of the tenant for life, by an indenture dated September 25, 1883, two of the surviving sisters and their respective husbands conveyed to the third sister (the vendor) all the estate, right, title, and demand of each of them respectively, to hold in fee simple.

The vendor set the premises up for sale by auction, describing them in the particulars as being held in fee simple, and stating the facts above mentioned in the conditions of sale. One of the conditions bound the purchaser to admit that after the deaths of the tenant for life and the deceased sister the entire interest in the premises became vested in the surviving sisters, and that the conveyance of September 25, 1883, vested in the vendor a good title to the premises for an estate in fee simple. The condition did not state, though the fact was so, that one of the surviving sisters who had conveyed to the vendor had children living, nor did it state that it was the contention of the vendor that the conveyance by the sisters operated as a release of the testamentary power of appointment given them by the will and codicil. The purchaser objected that a good title was not shown by the vendor, that under the will and codicil the sisters only took life estates with a power of appointment amongst their children, and that the condition binding the purchaser to admit that the vendor had vested in her an estate in fee simple was bad and misleading, and issued a summons, asking for a declaration that title had not been shown by the vendor, and for the return of the deposit paid to the vendor:—

V.-C.
1895.

In re
LYONS AND CARROLL'S CONTRACT.

Held, by the Vice-Chancellor, that the condition was good and binding, and that a good title within the condition was shown, and that the summons should be dismissed with costs.

Held, by the Court of Appeal, that there was no implied gift to the children of the sisters of the testator; that on the death intestate of the deceased sister the gift over to the survivors took effect; that the testamentary power of appointment given by the codicil to the survivors was capable of being released, and that it was released or extinguished by the conveyance, and that therefore a good title was shown by the vendor.

Per Lord Ashbourne, C.: The condition was not misleading.

Per FitzGibbon, Barry, and Walker, L.JJ.: The condition was not binding.

Per Lord Ashbourne, C., and Barry, L.J.: Where, as the natural consequence of the order of the Court on a summons made under the Vendor and Purchaser Act, 1874, it would be just to order the return of the deposit to the purchaser, the Court has jurisdiction so to order.

The vendor, though held to have shown good title to the premises, having in the Court below relied solely on the conditions, and refused to argue the question of title:—

Held, by the Court of Appeal, that he should be awarded no costs, either in the Court below or of the appeal.

SUMMONS on behalf of the purchaser asking for—1, a declaration that the vendor had not deduced good title to the fee-simple of the premises contracted to be sold by the contract dated the 12th July, 1895; 2, an order that the vendor be directed to return the deposit of £60 paid by the purchaser to the auctioneer at the sale with interest thereon; 3, that in default of payment of the said £60 and interest by the vendor, the same should be declared well charged on the vendor's interest in the premises; 4, the costs of the proceedings.

The vendor Mrs. Lyons, on July 12, 1895, set up for sale by public auction the house and premises known as 34, Wellington-street, Dublin describing them in the particulars as " held in fee-simple under Landed Estates Court Conveyance." William Carroll attended at the auction, and having bid £200 for the premises was declared the purchaser and paid a deposit of £60 in respect of his purchase-money and commission.

The sale was subject to conditions, of which the ninth—the only one material for this report—was as follows:—

" By his will, dated 25th May, 1875, William Murphy bequeathed the premises (subject to Rosanna Murphy's life interest created therein by an indenture dated 29th August, 1874), to his four sisters, Ellen Oates, Rosanna Mulvany, Elizabeth Goff, and Mary Lyons (the vendor), as their sole and separate property, and provided that in the event of any of his sisters dying, her share should be divided among the survivors, and by a codicil to his said will, dated the 29th May, 1875, he directed that each of his said four sisters should have power to leave by will amongst any child or children they might have, any property they might derive under his said will or codicil, and that in default of issue or such will, same should revert to the survivors. Rosanna Murphy, the tenant for life, died 1st September, 1883. Rosanna Mulvany died 9th August, 1883, having issue, but without having made any will. The purchaser will admit that after the deaths of Rosanna Murphy and Rosanna Mulvany the entire interest in the premises became vested in Ellen Oates, Elizabeth Goff, and the vendor, Mary Lyons; and that the conveyance dated the 25th September, 1883, and made between Thomas Oates and Ellen Oates of the first part, John Goff, and Elizabeth Goff, of the second part, the vendor, Mary Lyons, of the third part, vested in the said Mary Lyons a good title to the premises for an estate in fee-simple. The said conveyance will be produced at the sale, and may be inspected for seven days previously at the office of the vendor's solicitor."

An abstract of title and the various documents necessary for vouching the same was duly delivered to the purchaser's solicitor who after investigating the title wrote to the solicitor of the vendor raising the following objections—1, that on the true interpretation of William Murphy's will the gift over on the death of any of his sisters to the survivors would not take effect if the deceased sister left children, there being an implied gift to the children, even if their mother made no will; 2, that Mrs. Mulvany, the sister who was dead, had left children, and consequently the conveyance of September 25, 1883, did not vest a good title in the vendor for an estate in fee-simple, and that therefore the title mentioned in the particulars could not be given by her to the purchaser; 3, that Mrs. Oates and Mrs. Goff might have children, to whom they might leave their shares, and until the death of these ladies good title could not be shown. While raising these objections he stated that his client was a willing purchaser and asked to be informed of the names of all the children of the four sisters of William Murphy, and inquired if their execution of the conveyance to the purchaser could be obtained.

The solicitor for the vendor replied that the conditions had been prepared by counsel to meet the objections raised, and declined to comply with the requisitions so made on behalf of the purchaser.

The purchaser's solicitor then issued this summons.

The words of the material part of the codicil to William Murphy's will were :—" I further direct that each of my said four sisters shall have power to leave by will amongst any child or children they may have any property they may derive under my said will or this codicil, and that in default of issue or such will the same shall revert to the survivors as already mentioned in my said will."

The conveyance of September 25, 1883, recited William Murphy's title to the premises, his will and codicil, and probate thereof on his death ; the death of Rosanna Mulvany on August 9, 1883, " without having in any way dealt with her interest in the premises" ; the death of Rosanna Murphy on September 1, 1883, " whereupon the said Ellen Oates, Mary Lyons, and Elizabeth Goff became equally entitled to the said premises" : that a valuation of the premises had ascertained the value at £210, and that Mary Lyons being entitled to one-third of the interest of said premises had " agreed to purchase the shares or interest in the said premises of the said Ellen Oates and Elizabeth Goff, and to pay each of them therefor the sum of £70." Then in pursuance of this agreement and in consideration of the said two sums of £70, Ellen Oates and Elizabeth Goff, as beneficial owners, conveyed and assigned, and their respective husbands conveyed, assigned, and confirmed unto Mary Lyons the premises "and all the estate, right, title, interest, and claim, and demand of them the said Thomas Oates, Ellen Oates, John Goff, and Elizabeth Goff, in, to, out of, or upon the said hereditaments and premises," to have and to hold the same unto Mary Lyons, her heirs, and assigns for ever for her own separate estate.

It was admitted during the argument though it was not stated in the conditions or in the abstract that Mrs. Oates had children living.

V.-C.
1895.

In re
LYONS AND
CARROLL'S
CONTRACT.

H. Wilson, for the purchaser :—

A good title within the conditions of sale has not been shown. The testator by his will gave his four sisters an estate in fee as joint tenants, but by the codicil this is cut down to an estate for life with a power of appointment among their children. By the 9th condition of sale the vendor seeks to bind the purchaser to admit that the premises vested in the vendor in fee. A vendor cannot by conditions bind a purchaser to assume a wrong conclusion of law. Here there is an implied gift to the children of testator's sisters. The condition is misleading, and therefore not binding : *In re McVicker's Contract* (1). A purchaser cannot be asked to assume what the vendor knows to be not true : *Re Banister* (2) ; *Brewer* v. *Broadwood* (3) ; *Priestley and Davidson's Contract* (4).

Molony, for the vendor :—

The vendor relies on the conditions. Every material fact is set out. In *McVicker's Contract* (1) the terms of the will were not set out. So in *Re Banister* (2) the material facts were not stated. The right of a purchaser to a good title may be rebutted by showing that he is bound by conditions which state all the material facts : *Re Gloag and Miller's Contract* (5). [Counsel also referred to *Best* v. *Hamand* (6) ; *Nunn* v. *Hancock* (7) ; *Blenkhorn* v. *Penrose* (8) ; *In re National Provincial Bank of England and Marsh* (9) ; *Scott and Alvarez's Contract* (10).]

THE VICE-CHANCELLOR :—

Nov. 18.

This summons has been taken out by the purchaser for a declaration that a good title has not been deduced to the fee-simple of the premises set up for sale, and for repayment to him of a sum deposited by him with the auctioneer. The vendor contends that he has deduced a good title in fee according to the contract and conditions of sale, and that the purchaser is precluded by the 9th condition from objecting to the title, on the ground relied on by him, namely, that on the true construction of the will and codicil of William Murphy, under which title is made that vendor has not an estate in fee in the entire premises, but only an estate for life in an undivided fourth thereof. The 9th condition is in these terms. [His Lordship read the condition.] The objection of the purchaser is not founded on anything discovered by him which was not disclosed upon the condition, but on this—that on the face of the condition a wrong construction of law is drawn from the terms of the will and codicil. He assumes that on the true construction of the will and codicil the four sisters of the testator took only estates for life in their respective one-fourth shares with a power to each of testamentary disposition of her share to her children if any. The question of the construction of the will and codicil was not argued, as the vendor declined to go into it, relying on the terms of the 9th condition. It is evident from the conditions that doubts existed as to the construction of the will and codicil, and that the vendor desired to protect herself by a condition of sale against any objection being raised by a purchaser to the vendor's title on this ground. The 9th condition sets out fully and truly the terms of the will and codicil so far as was material to this question, and it has not been, and could not be, alleged that there was any suppression or misstatement of fact. The vendor, in effect, tells intending purchasers that on the documents, as set out in the condition, they must form their own opinion as to their legal operation, but that if they bid they must agree to be bound by the construction she puts upon them. The purchaser contends that it was not competent to impose such a condition, and that therefore it is void. This question does not turn upon the frame of the condition which expressly provides that the purchaser "will," which is a plain grammatical error for "shall," admit that after the death of a prior tenant for life, and of Rosanna Mulvany one of the four sisters, the entire interest in the premises (that is to say the fee-simple) became vested in the three surviving sisters (of whom the vendor is one), and that the conveyance from the other two sisters to the vendor vested in the vendor a good title to the premises for an estate in fee-simple.

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(1) 25 L. R. Ir. 307.
(2) 12 Ch. D. 131.
(3) 22 Ch. D. 105.
(4) 31 L. R. Ir. 122.
(5) 23 Ch. D. 320.
(6) 12 Ch. D. 1.
(7) L. R. 6 Ch. App. 850.
(8) 29 W. R. 237.
(9) [1895] 1 Ch. 190.
(10) *Ibid.* 596, and [1895] 2 Ch. D. [603.

It is not in the form that the vendor shall not be bound to show a good title, or that inquiries into or proofs of title shall be confined within specified limits in which cases a defect in title discovered by the purchaser *aliunde* may be relied on, but that the purchaser shall admit the vendor's seizin in fee under the instruments stated. There is nothing misleading in this, and a purchaser cannot say that any deceit or fraud is practised on him, when he is told that the vendor's title is derived under an instrument which is disclosed and truly stated, upon which the vendor puts the construction that it gives her the fee. In this respect the present case appears to me to differ from *In re McVicker's Contract* (1) decided by me, and affirmed by the Court of Appeal, where the condition did not set out the terms of the will, and thus give the purchaser the means of forming his own opinion upon them before bidding, but merely provided that the purchaser should assume that the vendor was then under a certain will entitled to the grantee's interest in a fee-farm grant. It also differs from *In re Banister* (2) where it was sought by a condition of sale to bind the purchaser to assume as a matter of fact what the vendor knew to be untrue.

The 9th condition in the present case comes clearly within the second class of conditions mentioned in Fry on Specific Performance, 3rd ed., 594, namely, cases in which the stipulations of the contract preclude the purchaser not only from making requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere; which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose. This statement of the law, independently of the weight due to it as coming from so high an authority, has been repeatedly recognised as accurate. It was referred to by North, J., in the recent case of *The National Provincial Bank of England and Marsh* (3), in his judgment reviewing the authorities on this subject. In that case the condition was as follows:—"The title shall commence with, &c., and the prior title, whether appearing in any abstracted documents or not, shall not be required, investigated, or objected to." The purchaser

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(1) 25 L. R. Ir. 307. (2) 12 Ch. D. 131. (3) [1895] 1 Ch. 190.

V.-C.
1895.
In re
LYONS AND
CARROLL'S
CONTRACT.

objected to the title on the ground that he had discovered *aliunde* that by a prior will the grantor in the deed with which the title commenced was only a tenant for life. North, J., on a full consideration of the authorities, held that the purchaser was precluded by the condition from making the objection.

In the case of *Scott and Alvarez's Contract*, reported first in [1895] 1 Ch. 596, and again in [1895] 2 Ch. 603, a condition of the same class was held by the English Court of Appeal, to bind the purchaser even though a case of gross fraud was discovered, and a summons like the present to recover the deposit was dismissed. In that case judgment in an action by the vendor for specific performance of the contract was refused; but I need not refer to that portion of the case as I have not to deal here with the right to specific performance.

I dismiss the summons with costs.

T. H. M.

Appeal.
1895.
Dec. 8, 9, 20.

The purchaser appealed to the Court of Appeal (LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L.JJ.)

Herbert Wilson, for the appellant:—

The vendor offered for sale a house held in fee-simple; but she shows title only to an estate for life in an undivided fourth. The 9th condition purports to bind the purchaser to assume what is false: such a condition will not be enforced: *In re Banister* (1). This condition, in addition to stating the material facts, goes on to state, not as an assumption of law but as a matter of fact, that the vendor had an estate in fee-simple in the premises: the purchaser is entitled to require this to be proved: *Johnston* v. *Smiley* (2); *McVicker's Contract* (3); Dart's Vendors and Purchasers, p. 171; Webster on Conditions of Sale, p. 29.

[WALKER, L.J.: Do you contend that there was a gift by implication to the children of the testator's sisters?]

No; but under the codicil each of the sisters has a power of

(1) 12 Ch. D. 131. (2) 17 Beav. 233. (3) 25 L. R. Ir. 307.

appointing or devising to her children, and has only a life estate herself.

The 9th condition binds the purchaser to admit (*a*) that after the deaths of Rosanna Murphy and Rosanna Mulvany *the entire interest* in the premises became vested in Ellen Oates, Elizabeth Goff, and Mary Lyons; but on the only possible construction of the codicil all that each of these three sisters took thereunder was an estate for life with a power to dispose of her share by will amongst her children: the only means by which the entire interest in the premises could have become vested in the three sisters was by their having executed a release of their powers of appointment: no such release was executed—the condition deliberately suppresses this fact—it amounts, therefore, either to a *suppressio veri* or a *suggestio falsi*, and will be treated as not binding: *In re Marsh and Earl Granville* (1). The condition also binds the purchaser to admit (*b*) that the conveyance dated September 25th, 1883, vested in Mary Lyons a good title to the premises for an estate in fee-simple. This second admission is required as a corollary or deduction from the first, and if the first fails, the second also fails. It, too, is invalid by reason of the non-existence of a release of the testamentary power not being disclosed.

The condition does not say whether Mrs. Oates or Mrs. Goff has any children: it is so drawn as to lull suspicion. It is admitted now that Mrs. Oates has children. The importance of this fact cannot have escaped the vendor. The fact that Mrs. Mulvany left children is particularly stated, as is also the matter which prevents her children taking any interest in the premises, viz. her dying intestate. Nothing has yet occurred to deprive Mrs. Oates' children of the possibility which the testator bequeathed to them; the condition attempts to get over this difficulty by omitting all reference to their existence—an uncandid omission will not be supported: *Dykes* v. *Blake* (2). Mrs. Oates and Mrs. Goff were married women at the date of the conveyance of September 25th, 1883, and acknowledged that deed under the Act for the Abolition of Fines and Recoveries, 4 & 5 Wm. 4, c. 92; the conveyance is therefore operative to carry their respective life

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(1) 24 Ch. D. 11; see p. 17, 24.

(2) 4 Bing. N. C. 474.

Appeal.
1895.

In re
LYONS AND
CARROLL'S
CONTRACT.

interests. But the only way they could have released the power vested in them by the codicil was by the express terms of sect. 68 of 4 & 5 Wm. 4, c. 92, *i.e.* by executing and acknowledging a deed of release: see Wolstenholme and Turner, Conveyancing Act, 1881, sect. 52. It is impossible that a married woman could be held to release a power under sect. 68 of 4 & 5 Wm. 4, c. 92, by implication.

Hargreaves and Thompson's Contract (1) is a clear authority that the Court has jurisdiction to direct the return of the deposit. This case was followed in *Priestley and Davidson's Contract* (2).

Molony for the respondent:—

There is no gift by implication to the children of the testator's sisters: *Kinsella* v. *Caffrey* (3); followed and approved of in *In re Rawlins' Trusts* (4); affirmed in the House of Lords under the name of *Scale* v. *Rawlins* (5).

It is admitted that the testamentary power given to Mrs. Goff and Mrs. Oates could be released. The conveyance of September 25th, 1883, recites the will and codicil which conferred that power: and, having executed that conveyance, Mrs. Goff and Mrs. Oates cannot exercise the testamentary power; they can do nothing to defeat the deed; they cannot derogate from their own grant: see the observations of James, L.J., in *Alexander* v. *Mills* (6), and of Kay, L.J., in *Cooper.* v. *Slight* (7).

The 9th condition states the facts fairly and fully: it was not material to state whether Mrs. Oates and Mrs. Goff, or either of them, had children. If there were such children, they might die in the mother's lifetime: if there were no children yet born, they might be born after the purchase. It is as a conclusion of law not of fact that the purchaser is bound to admit that the entire interest was vested—1, in the three sisters; and 2, in the vendor: *Eaglesfield* v. *Marquis of Londonderry* (8).

In re Banister (9) was a case of specific performance. All it decides is that a condition is bad if it binds the purchaser to assume what the vendor knows to be false, or if it avers that the state of the title is not accurately known when in fact it is known to the vendor. In *McVicker's Contract* (1) the facts were not stated: in *Johnston* v. *Smiley* (2), there was a positive statement not true in fact. In *In re Marsh and Earl Granville* (3), it was not disclosed that the root of title—a deed less than forty years old, was a voluntary conveyance, but that is not a decision that every negative fact must be stated.

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(1) 32 Ch. D. 454.
(2) 31 L. R. Ir. 122.
(3) 11 Ir. Ch. R. 154.
(4) 45 Ch. D. 299.
(5) [1892] App. Cas. 342.
(6) L. R. 6 Ch. App. 124, at p. 133.
(7) 27 Ch. D. 565, at p. 569.
(8) 4 Ch. D. 693.
(9) 12 Ch. D. 131.

The Court will not order the deposit to be returned. The purchaser has failed to carry out his part of the contract: he contracted to admit that the vendor was seized in fee-simple, but he refuses to admit this: *Blenkhorn* v. *Penrose* (4), *Best* v. *Hamand* (5), *Rosenberg* v. *Cook* (6).

[Barry, L.J. Do you contend that if the condition was misleading owing to fraud on the part of the vendor that the deposit should not be returned] ?

Yes. On a summons under the Vendor and Purchaser Act, 1874, the Court has no power to order the return of the deposit, *In re National Provincial Bank and Marsh* (7), even where the vendor has been guilty of fraud: *Scott and Alvarez's Contract* (8). In such proceedings the purchaser is bound to admit the contract: *In re Sandbach and Edmondson's Contract* (9).

Lord Ashbourne, C. :—

Dec. 20.

This is an appeal from an order of the Vice-Chancellor, whereby this Court is asked to declare that the vendor has not deduced good title to certain premises which she has contracted to sell, and to direct that the vendor should return to the purchaser the deposit made by him at the date of the sale.

The contract which has given rise to the question in this case was a contract to sell the house and premises No. 34, Wellingto street, in the city of Dublin, which the particulars describe as being held in fee-simple.

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(1) 25 L. R. Ir. 307.
(2) 17 Beav. 233.
(3) 24 Ch. D. 11.
(4) 29 W. R. 237.
(5) 12 Ch. D. 1.
(6) 8 Q. B. D. 162.
(7) [1895] 1 Ch. 190.
(8) *Ibid.* 596; 2 Ch. 603.
(9) [1891] 1 Ch. 99.

It has been argued before us that the appeal cannot be sustained on two grounds—first, that by the conditions of sale the purchaser is precluded from taking the objection to the title which he has made: and secondly, that upon the true view of the case a good title has in fact been shown. Before the Vice-Chancellor the vendor by her counsel, rested her case entirely upon the first of these grounds, and steadily refused to discuss the question of title.

The case turns upon the 9th condition. It has been often read and referred to by both sides during the argument, it is fully stated in the judgment of the learned Vice-Chancellor, and I do not propose now to read it. What is the effect of this condition? Does it do anything more than give the true effect of the will and codicil of William Murphy, and the conveyance to the vendor? Is it misleading, because it does not more fully set out the substance of this will and codicil, and the effect of this conveyance? Again is it wanting in candour because it does not state, that there were children of Mrs. Oates in existence, and that the contention and construction of the vendor was that the exercise of the power of appointment in favour of these children was prevented by the conveyance? I think it would have been more frank, candid and satisfactory if the condition had more explicitly stated these several matters. But although I have some doubt on the subject I am not disposed to dissent from the judgment of the Vice-Chancellor on this point, and to hold the condition bad.

I arrive the more readily at this conclusion on the first branch of the argument, because on the second point in the case I have formed the opinion that, on the true construction of the will and codicil and giving to the conveyance its legitimate effect, the vendor has shown a good title. I am of opinion that there is no gift by implication to the children: on the death of Mrs. Mulvany intestate, the gift over in default of her having made a will took effect; and the subsequent conveyance by her surviving sisters to the vendor precludes them from defeating it by exercising the testamentary power given to them by the will and codicil of William Murphy.

An argument was addressed to us by the learned counsel for the vendor; and an array of authorities were cited in support of his contention—that this Court has no power, in a proceeding like the present, to order the return of the deposit to the purchaser. I cannot accede to this argument. I think it is disposed of by the case cited by Mr. Wilson: *Hargreaves and Thompson's Contract* (1). There the Court of Appeal in England directed the deposit to be returned, and Lord Justice Cotton pointed out that there was ample jurisdiction so to do under the words of section 9 of the Vendor and Purchaser Act, 1874, which give to the Court authority, in a matter like that before us, to decide the questions asked, and also, as the natural consequence, to make such order as the Court may think "just."

For the reasons I have stated, I am of opinion that the appeal must be dismissed, but without costs either here or in the Court below, as the vendor did not argue the question of title before the Vice-Chancellor.

Fitz Gibbon, L.J.:—

It is unnecessary to give any opinion upon the question as to the power of ordering a return of the deposit to a purchaser, on a summons under the Vendor and Purchaser Act, 1874, where the contract has been held not binding.

As to the condition, I am unable to agree with the Vice-Chancellor: I think it is misleading. I do not think that any person reading it would collect from it the real position of the title. It disguises the truth, and it puts the reader off the scent. It states, as though they alone were material, matters which are less material, and thereby distracts attention from the omission of what is more material. Accordingly, if we were to decide the case as it was argued before the Vice-Chancellor, on the condition alone, I think that the contract should not be enforced. But I am of opinion that the vendor has shown a good title. The sisters took their several estates, with a testamentary power of appointment amongst children, followed by a limitation over in default of issue, *or of appointment*. No estate is expressly given

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(1) 32 Ch. D. 454.

Appeal. 1895.

In re LYONS AND CARROLL'S CONTRACT.

Fitz Gibbon, L.J.

to the children, and they cannot take merely by implication, because there is an express limitation over in the event of failure to appoint. One sister has died without appointing, and the only question is whether the surviving sisters have by their conveyance precluded themselves from appointing. I think it is clear, on the present state of the authorities, that a conveyance for value of all the estate and interest of the grantor precludes him from subsequently exercising any power so as to defeat the title of the grantee.

We will declare that the vendor has shown a good title; but as her counsel refused to argue the question of title in the Court below, and has failed on the condition, she must abide her own costs both of the hearing in that Court and of the appeal.

BARRY, L.J. :—

I concur. On the part of the vendor there was a startling proposition argued. It was said that if we found this condition misleading, even though we should think it was adopted from fraudulent motives, we could not in this proceeding order that the deposit should be given back. I own that I was much startled by that proposition. But the learned counsel for the vendor referred us to a case, *Scott and Alvarez's Contract* (1), which he said bore out his contention. That is a very complicated case, and I am bound to say not very creditable to our system of judicature. Lord Justice Lindley says that the question argued in that case (2) arose " under a very unfortunate litigation." He points out that the purchaser instead of finding he has bought "a small safe investment" as the property was described "is embarked in two lawsuits, and two appeals, and is threatened with more." Lamentable as the case may be in its result, is it as bad as Mr. Molony says? How does it bear out the proposition that we have no power to direct a fraudulent vendor to give back the deposit? The Judge who tried the action, Kekewich, J., expressly finds (at the conclusion of his judgment) that the plaintiff, as well as the defendant, was an innocent party who had to suffer for the conduct of others. After such a finding the decision that the vendor would not be ordered to return the deposit affords no support to Mr. Molony's contention which was expressly that even when the vendor has been guilty of fraud there was no jurisdiction to order the return of the deposit.

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(1) [1895] 1 Ch. 596; 2 Ch. 603.

(2) [1895] 2 Ch. at p. 609.

In the present case I am of opinion that the 9th condition is misleading, but that the title is good. On Mrs. Mulvany's death intestate her children took nothing as she did not exercise her power of appointment. The deed of grant now precludes the surviving sisters from exercising their power of appointment. The vendor can therefore give a perfectly good title.

Walker, L.J.:—

I am not prepared to say that if the only condition were what is contained in the first branch of it, viz. "the purchaser will admit that after the deaths of Rosanna Murphy and Rosanna Mulvany the entire interest in the premises became vested in Ellen Oates, Elizabeth Goff, and the vendor Mary Lyons," there would not be difficulty in saying that the purchaser was not bound because all the facts are stated truly, and the only ambiguity would arise on the use of the words "entire interest," but the condition goes on, "and that the conveyance dated the 25th September, 1883, and made between Thomas Oates and Ellen Oates of the 1st part, John Goff and Elizabeth Goff the 2nd part, the vendor Mary Lyons of the 3rd part, vested in the said Mary Lyons a good title to the premises for an estate in fee simple." It is not stated what is now admitted that one of the sisters, Mrs. Oates, has children, nor is there anything stated which would bring a purchaser's mind to bear upon the questions arising on that fact, or on the question whether the testamentary power was capable of being released either expressly or by inconsistent disposition.

If a purchaser is to be bound by a condition limiting his rights such condition must—to use the words of Cotton, L.J., in *In re Marsh and Earl Granville* (1)—be "fair and explicit," and he defines this, "I think that the test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor which are material to enable the purchaser to determine whether or not he will buy the property subject to the stipulation limiting his right." There were facts within the knowledge of the vendor most material to guide judgment, and I also think that the purchaser should not be bound by a condition which requires an admission that the conveyance of 25th September, 1883, vested a fee-simple estate in Mary Lyons where the question is the legal effect of the conveyance, depending not only on its own construction but on the existence of children not stated and the release of a testamentary power—a matter not suggested. I do not think the purchaser is bound by this condition. But the question remains whether a good title is shown.

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(1) 24 Ch. D. at p. 24.

This involves three questions: 1, whether there is a gift to the children by implication; 2, whether this testamentary power could be released; 3, whether the deed of 25th September, 1883, had that effect?

The general rule is well settled that there can be no estate by implication in default of appointment in the objects of a power where the instrument creating it makes express provisions for the event by specifying who are to take in that event: Sugden, 596. I shall only refer to two very recent and extreme cases as illustrating that rule: In *Richardson* v. *Harrison* (1), there was a devise to a daughter for life, and after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint; and in default of such appointment in trust for the daughter's right heirs. Lord Esher says, "In the will before us there is an ultimate limitation in express terms to the right heirs of Eliza Hayles in default of the exercise of the power of appointment amongst her children, therefore no estate can be implied in favour of the children"; and Lord Justice Cotton says the same. Another extreme case is *Miley* v. *Cape* (2), where the gift in default of appointment was itself void for remoteness, and yet it was held sufficient to exclude an estate by implication in the objects.

The next question is whether the power could be released. I shall pass over cases where the power to appoint was by deed or will, though it is difficult to distinguish them in principle. It is clear that a fiduciary power — one coupled with a duty

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(1) 16 Q. B. Div. 85.

(2) 43 L. T. (N. S.) 237.

Appeal.
1895.
In re
Lyons and
Carroll's
Contract.
Walker, L.J.

to execute it—cannot be released, for which the last authority is *Eyre* v. *Eyre* (1), because the donee is a trustee of such a power bound to preserve it, and cannot destroy it more than any other trust committed to him.

The general proposition, however, that a power to appoint exercisable at option, whether by deed or will, can be released is to be found in Sugden's work, and cases are cited of which one of the earliest is *West* v. *Burney* (2). But Smith, M. R., and Lord Chancellor Brady expressly differed on the point whether a testamentary power could be released. The former held in *Re Chambers* (3) that such a power could be released, and Brady, L. C., in *Stuart* v. *Kennedy* (4), a case which has not found its way into the authorized Reports or any text book, expressly decided that it could not. In this conflict of opinion the matter might be doubtful, but later cases are in favour of Mr. Smith's view. For instance, *Coffee* v. *Cooper* (5), where Vice-Chancellor Kindersley treated the point as decided by the cases, though he found fault with them as contrary to the intention of the power which was to keep it open till death. To the same effect is *Isaac* v. *Hughes* (6), and *Palmer* v. *Locke* (7), where the power was a limited one of appointing by will only among children, and James, L.J., says:—"It has been decided, in various cases, that such a power as this could be released, because although in some sense it is fiduciary, it is fiduciary only to this extent that the donee cannot use it for any corrupt purpose." This question is a different one from whether a power exercisable by will only can be exercised by any other instrument. *Reid* v. *Shergold* (8) and other cases decide it cannot.

Section 52 of the Conveyancing Act, which is I think a declaratory section, enacts that "A person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power." As regards this section, Vice-Chancellor Bacon says in *Shirley* v. *Fisher* (9) "The power to assign, the power to revoke, are plainly recognised by the statute passed be it observed after this particular point, or a point connected with this in some degree, more or less had perplexed and troubled the Court for years. It was to remove all doubts that the statute says in express explicit terms that the person to whom any power whether coupled with an interest or not is given may by deed release or contract not to execute a power." I think, therefore such a power can be released either expressly or impliedly. It is clear that any dealing with the estate so as to create interests inconsistent with the exercise of the power extinguishes the power as derogating, if exercised, from the grant, and it being at the option of the donee whether he will exercise it or not: *Smith* v. *Death* (1), and numerous other cases.

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(1) 49 L. T. (N. S.) 258.
(2) 1 Russ. & M. 431.
(3) 11 Ir. Eq. R. 518.
(4) 3 Irish Jurist, 305.
(5) 2 Dr. & Sm. 365.
(6) L. R. 9 Eq. 191.
(7) 15 Ch. D. 299.
(8) 10 Ves. 370.
(9) 47 L. T. (N. S.) 109.

Turning then to the deed of the 25th September, 1883, it recites that those parties became equally entitled, on the death of Rosanna Murphy, and then the two for valuable consideration, convey and assign to Mrs. Lyons those premises and all the interest, claims, and demands of each of them.

The effect of such a deed is to carry every interest which the grantor can part with and does not except: *Johnson* v. *Webster* (2); and of course an exercise of the power by the grantors would wholly defeat this grant.

I agree that a good title is shown. I express no opinion as to whether a return of the deposit could be ordered as the question does not arise. If it did the case of *Dane and Carey's Contract* (3) and others would have to be considered.

Solicitor for the vendor: *James Goff.*

Solicitors for the purchaser: *Molloy & Molloy.*

G. Y. D.

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(1) 5 Madd. 371. (2) 4 De G. M. & G. 488. (3) 40 Ch. D. 601.

In re HOBAN, Deceased.

LONERGAN v. HOBAN.

(1894. No. 5986.)

M. R.
1895.
Feb. 27, 28.

Assignment of chattel real—Husband and wife—Joint tenancy—Severance—Power of executor—Assent to legacy—Dealing with assets—Judgment for administration—Lis pendens.

By a paper writing, not under seal, executed on the marriage of A with B in 1855, reciting an agreement by A's father, C, to make over to A, C's right, title, and interest in a certain farm, held for a chattel term, in consideration of B's fortune, it was witnessed that C, who was an executing party to the document, "covenanted and agreed with A that he (C) did thereby grant and assign to A and B" the said farm, to hold the same to the said "A and B, their heirs, executors, administrators, and assigns," for the residue of the term:—

Held, 1st, that the instrument passed an immediate interest in the farm to A and B as joint tenants; 2ndly, that A, the husband, not having disposed of the farm during the coverture, the joint tenancy was not severed, and that, on the death of A, B, who survived him, became solely entitled to the farm.

After a judgment for the administration of personal estate, in an action not registered as a *lis pendens*, the executor of the deceased and the residuary legatee, both of whom had full notice of the action, assigned to a *bona fide* purchaser for value, without notice of the action or judgment, a chattel real, which was part of the assets of the deceased:—

Held, that the assignment was effectual to vest a good title in the purchaser unaffected by the administration proceedings.

Summons.

By indenture of lease dated the 19th February, 1849, William Hastings Greene and William Warren Hastings Greene, demised a farm of land, situate at Dangan, in the county Kilkenny, to Michael Hoban, his executors, administrators, and assigns, from the 25th March, 1849, for the term of 199 years, at the yearly rent of £129 5*s*.

By an instrument not under seal dated the 24th April, 1855, and made between Michael Hoban of the first part, Martin Hoban, his son, of the second part, James O'Neill of the third part, and Ellen O'Neill (daughter of said James O'Neill) of the fourth part (being the settlement executed upon the marriage of Martin Hoban and Ellen O'Neill) after reciting the lease to Michael Hoban, and the intended marriage, it was recited that the following agreement had been entered into by all the parties:—"that is to say, that he the said Michael Hoban agrees to make over unto his said son, the said Martin Hoban, all his the said Michael's right, title, and interest of in and to the above recited lands and premises, and in as full and large and ample a manner as the said Michael Hoban now enjoys and is in possession of the same, for the sum of £320 sterling paid to him by the said James O'Neill (party to the deed) as and for a marriage portion or fortune of his daughter the said Ellen O'Neill." And it was witnessed that "for and in consideration of said intended marriage and said sum of £320 he the said Michael Hoban doth hereby for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said Martin, his executors, administrators, and assigns, that he the said Michael doth hereby grant, bargain, sell, assign and make over, unto the said Martin and Ellen O'Neill (his intended wife) all that and those the hereinbefore recited lands and premises, together with the lease thereof, situate at Dangan, aforesaid, etc., in as large and ample a manner as the same is held by said recited indenture of lease, and now in the possession of the said Michael, to have and to hold the same unto the said Martin Hoban and Ellen (his intended wife) their executors, administrators, and assigns, for all the rest, residue, and remainder of said term of 199 years yet to come and unexpired, subject to the yearly rent and performance of the covenants in said recited lease reserved and made payable." There was a covenant by Michael that he had full power to make the conveyance, and for further assurance; and a clause that he should be at liberty, if he chose, to reside with and have his support and maintenance with Martin and his wife Ellen.

Martin Hoban remained in possession of the farm of Dangan till his death in May, 1887. By his will, after certain pecuniary legacies, he gave and bequeathed to his wife, Ellen Hoban, all the residue of his property of every description, subject to the payment of a legacy of £400, to his niece Bridget O'Neill to be paid on her marriage with the consent of her father, Nicholas O'Neill, and charged the same upon all his property. He appointed Nicholas O'Neill sole executor, and probate was granted to him, on the 13th June, 1887.

In 1884 an order had been made in a creditor's suit for the administration of the estate of Peter Hoban, deceased, a brother of Martin Hoban. This suit was not registered as a *lis pendens.* By an order dated the 4th August, 1890, reciting that some of the assets of Peter had come into the hands of Martin, who was the administrator of Peter, an order was made for the administration of the assets of Martin Hoban, such assets to be liable so far as he had received assets of Peter, and had not accounted for them. The proceedings were continued against Nicholas O'Neill as executor of Martin Hoban. On the 4th December, 1893, an order was made for the sale of the farm of Dangan, as assets of Martin Hoban, and on the 17th December, 1894, an order was made for the transfer of the carriage of the sale of the lands to the plaintiffs.

After the death of Martin Hoban, in 1887, his widow Ellen Hoban remained in possession of the farm of Dangan.

By indenture dated 19th September, 1892, made between Ellen Hoban of the first part, Daniel Murphy and James Keeffe of the second part, Bridget O'Neill of the third part, James Murphy, son of the said Daniel Murphy, of the fourth part, and Nicholas O'Neill, father of the said Bridget O'Neill, of the fifth part, after reciting the indenture of lease of 1849, the settlement of 24th April, 1855, the death of Martin Hoban, and the provisions of his will, and reciting that all the pecuniary legacies bequeathed by the will, except the legacy of £400 to Bridget O'Neill, had been paid, and reciting that the said Nicholas O'Neill had assented to the residuary bequest to said Ellen Hoban, and that all the lessee's interest under said lease was thereby vested in said Ellen Hoban for the residue of the said term either by virtue of the said recited settlement of 1855, or under the said will, or by the combined operation of both, and reciting that a marriage had been arranged and was intended to be shortly solemnized between the said James Murphy and Bridget O'Neill (with the consent of her father, the said Nicholas O'Neill, as he did thereby declare), and that upon the treaty therefor it had been agreed that the said Ellen Hoban should sell and assign all her interest in the said lands and premises, and also all stock, &c., for the price of £500, to be paid to her by the said Daniel Murphy, and that the said Bridget O'Neill should execute the release thereinafter contained in respect of her legacy of £400, and that the said James Murphy should enter into the covenant on his part thereinafter contained, it was witnessed that in consideration of the intended marriage, and in pursuance of the treaty for the same, and in consideration of the payment of £500 to Ellen Hoban by Daniel Murphy, and also in consideration of the release on the part of the said Bridget O'Neill, and of the covenant on the part of the said James Murphy therein contained, she the said Ellen Hoban, as beneficial owner, did thereby assign unto the said Daniel Murphy and James Keeffe all that and those the hereditaments and premises comprised in and expressed to be demised by the lease of 1849, to hold said premises unto the said Daniel Murphy and James Keeffe, their executors, administrators, and assigns, for the residue of the said term of 199 years, subject to the reserved rent and the covenants and conditions of the lease, upon trust for the said Ellen Hoban until the marriage, and from and after the solemnization thereof, upon trust for the said Ellen Hoban for her life and after her decease in trust for the said James Murphy during his life and after his decease, or in case he should die in the lifetime of the said Ellen Hoban, then after her decease, in trust for the said Bridget O'Neill during her life, and after the decease of the survivor of them the said James Murphy and Bridget O'Neill, or in case they should both die during the lifetime of the said Ellen Hoban, then, on the death of Ellen Hoban, in trust for such child, children, or remoter issue of the said intended marriage, at such times and in such shares and manner as the said James Murphy and Bridget O'Neill should appoint, and in default of appointment or disposition by will in trust for the children of the marriage as therein provided. There was an ultimate trust in favour of the next of kin of James Murphy. And it was declared that during the lifetime of the said Ellen Hoban the said James Murphy should have the sole control and management of the said farm and premises, and should receive and take the profits thereof for his sole and exclusive use and benefit. Then followed a covenant on the part of James Murphy to support and maintain Ellen Hoban. And the indenture also witnessed that Bridget O'Neill, with the consent and approval of her father Nicholas O'Neill, released the lands and premises of Dangan, and all the real and personal property of Martin Hoban, deceased, from the legacy of £400, and also released the said Ellen Hoban and Nicholas O'Neill, as executor of the will of Martin Hoban, deceased, from all claims in respect of the said legacy of £400.

On 8th February, 1895, the present summons was issued on behalf of Daniel Murphy and James Keeffe, as trustees of the marriage settlement of 1892, for an order that they should be allowed to intervene in the administration suit, and that all further proceedings under the orders of 4th December, 1893, and 17th December, 1894, which related to the sale of the lease of the farm of Dangan, in the county of Kilkenny, should be stayed on the ground that the said Daniel Murphy and James Keeffe had become *bona fide* purchasers for value, without notice, under the indenture of marriage settlement and conveyance dated 19th September, 1892.

On the hearing of this summons evidence was adduced which satisfied the Court that the trustees had no notice of the administration suit, and that the marriage settlement of 1892 was a *bona fide* transaction, entered into by them on the assumption that Ellen Hoban had power to deal with the farm of Dangan. It was proved that £500 was paid by Daniel Murphy to Ellen Hoban. The Court was also satisfied on the evidence that Nicholas O'Neill and Ellen Hoban had at the date of the settlement full knowledge of the proceedings at law concerning the estate of Martin Hoban. There was no proof given of any assent of Nicholas O'Neill, as executor of Martin Hoban, to any legacy or bequest given to Ellen Hoban by the will of her husband Martin prior to the execution of the settlement of 1892.

Price Q.C. (with him *Gerald Brunskill*) in support of the summons:—

The farm of Dangan was not assets of Martin Hoban but belonged to his widow Ellen Hoban, by right of survivorship. The effect of the settlement of 1855 was to create a joint tenancy. It was not in the nature of marriage articles or an executory agreement but was a present conveyance which passed the farm directly to Martin Hoban and Ellen his intended wife, as joint tenants. The operative part of the deed is conclusive on this point and it cannot therefore be controlled by the recital: Elphinstone on Interpretation of Deeds, pp. 129, 130. [Counsel also cited *M'Creery* v. *Luttrell* (1).]

Even supposing this document to be merely an executory contract and that it were necessary to have a more formal conveyance prepared under the direction of the Court, the Court will follow the manifest intention of the parties which was to constitute a joint tenancy in the husband and wife. The operative part is in favour of Martin and Ellen.

Their subsequent marriage was not a severance of the joint tenancy: *Hughes* v. *Anderson* (2) ; *Barton's Trusts* (3) ; and no act of severance during the continuance of the marriage has been proved or even suggested. Then Mrs. Hoban having survived her husband became entitled to the whole of the lessee's interest in the farm of Dangan. Even assuming the farm of Dangan to be assets of Martin Hoban, the effect of the marriage settlement of 1892 was to convey a good title to the trustees, as *bona fide* purchasers for valuable consideration without notice. The evidence shows that so far as the trustees and the intended husband and wife were concerned the settlement was a transaction entered into in good faith, and without any knowledge of the decree for the administration of Martin's assets or that Mrs. Hoban had no power to dispose of the farm. It is proved that £500 was paid to Mrs. Hoban by the father of the bridegroom. Before the decree for administration in 1890, Nicholas O'Neill as the executor of Martin Hoban, assented to the legacy in favour of Ellen Hoban by permitting her to remain on in the farm of Dangan. At any rate O'Neill as executor of Martin Hoban was an assenting party to the settlement of 1892, and the fact of the existence of a suit for the administration of the testator's assets, which was not registered as a *lis pendens* did not deprive the executor of the power of assenting to the legacy or bequest: *Berry* v. *Gibbons* (1).

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(1) 2 Ir. C. L. R. 289. (2) 38 Ch. D. 286. (3) 10 Hare, 12.

We are therefore entitled to have the present application granted.

Matheson, Q.C., and *Battersby*, for the plaintiffs:—

We submit that this farm of Dangan was assets of Martin Hoban. The informal document of 1855 constituted only an executory contract and had not the effect of creating a joint tenancy in Martin Hoban and Ellen Hoban. On its construction that was not the intention of the parties. The recital in the document is clear and that recital was of an intention to convey to Martin. The operative part on the other hand is decidedly ambiguous. We admit that marriage in itself would not have been a severance of the joint tenancy, but deny that there was such tenancy existing. It is plain that, in the subsequent transactions in the case, all the parties intended that this leasehold interest should be dealt with as assets of Martin Hoban. It has not ceased to be assets. Once the decree for administration of the estate was made the power to assent to the disposition of the farm was taken away from the executor Nicholas O'Neill, and there is no evidence of his assenting till 1892, when his power to do so was gone. Both he and Mrs. Hoban attempted in 1892 to commit a fraud on the creditors of Martin, and the whole transaction is tainted with fraud. *Berry* v. *Gibbons* (1) is distinguishable from the present case. On these grounds we submit that no good title passed to the trustees under the settlement of 1892, that the order of 1893 for the sale of the farm was rightly made and that this application must be refused.

Gerald Brunskill was not called on to reply.

The Master of the Rolls:— Feb. 28.

This action was brought in the first instance to administer the assets of Peter Hoban deceased. Peter and Martin were both sons of Michael Hoban, and Martin became the personal representative of Peter. Some of Peter's assets came into the hands of Martin

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(1) L. R. 8 Ch. App. 747.

M. R.
1895.
LONERGAN
v.
HOBAN.

and were not accounted for, and in order to effectuate the rights of the parties in the action, which was a creditor's suit, it became necessary to administer the assets of Martin, and there was a decree made that the usual accounts and inquiries should be taken as to his estate, his assets being only liable so far as he had received assets of Peter and had not accounted for them. In the course of the proceedings an order was made for the sale of the farm of Dangan, which was undoubtedly in the occupation of Martin at the time of his death, and in occupation of which his widow remained after his death. The order for sale was made in a regularly constituted suit, and would be a valid order if the farm of Dangan formed part of the assets of Martin, and in this suit it was so assumed and treated; but it turned out, in the course of the proceedings, that there was a claim set up in respect of the farm of Dangan by the persons who have brought the present summons. Daniel Murphy and James Keeffe are trustees of a settlement, dated 19th September, 1892, executed on the marriage of Bridget O'Neill (a niece of Mrs. Hoban) with James Murphy, and they here claim under that settlement to be entitled to the farm of Dangan. The present summons is brought for the purpose practically of discharging the order for sale of the farm on the ground "that the said Daniel Murphy and James Keeffe had become *bona fide* purchasers for value, without notice, under an indenture of marriage settlement and conveyance dated the 19th September, 1892, and executed previously to the making of said order of the 4th December, 1893." The application is "that they should be allowed to intervene in this matter, and that all further proceedings under those parts of the orders herein dated respectively the 4th December, 1893, and the 17th December, 1894, which relate to the sale and the lease of the farm of Dangan in the county Kilkenny may be stayed."

That summons, as so framed, admittedly proceeds on the basis that the farm of Dangan was part of the assets of Martin, and the trustees of the settlement of 1892 put forward no claim except as purchasers *bona fide* for value and without notice. A large portion of the argument in the case turned on that latter question, viz., whether they were purchasers in good faith, for value and without notice. There is no question that they were purchasers for value under the settlement, and it is clear that they became trustees of the settlement in good faith, in the sense of its being a real, genuine transaction. But, on the hearing of the summons, considering the relations of the parties, the father of the intended wife being also the executor of Martin Hoban, and that there was a great deal of suspicion as regards the time the settlement took place, that is, after the order for administration, I thought it desirable that the parties should be examined *viva voce* before me.

Though the question I have mentioned was argued both on the first occasion of the hearing and on the second, another and a different question has been raised, and the right of the trustees is placed on a different basis, viz. that the farm of Dangan was not the assets of Martin Hoban at all, but belonged to his widow, Ellen Hoban. I have formed an opinion on both branches of the case, and think it better to express that opinion on both branches, though the view I take on one of them is sufficient to settle the case.

It appears that by a settlement dated 24th April, 1855 (being the marriage settlement of Martin Hoban), his father Michael Hoban, who was the owner of the farm of Dangan, held under lease for the residue of a term of 199 years, put it into settlement. The settlement is extremely informal; nay, more, it is stupid and self-contradictory. But it is contended that, on its true construction, it passed the farm directly to the husband and the intended wife in terms sufficient to make them joint tenants, and that there is nothing in proof to show any severance of the joint tenancy.

The deed—in the presumption of law and in absence of proof to the contrary it is a deed—is not, so far as one can see, sealed. It does not bear the name of any solicitor—a fact I am not surprised at. It recites: "Whereas the said Michael Hoban is seised and possessed by a certain indenture of lease from Wm. Warren Hastings Greene and his son, made to him the said Michael Hoban in February, 1849, of that part of the lands of Dangan aforesaid, for a term of 199 years, and at the yearly rent of £129 sterling: and whereas a marriage is shortly intended to be had and solemnized by and between Martin Hoban and the said Ellen O'Neill parties hereto, the following agreement has been entered into by and between all the parties hereto: That is to say that he the said Michael Hoban agrees to make over unto his said son the said Martin Hoban all his the said Michael's right, title, and interest, of, in, and to, the above recited lands and premises, and in as full and large and ample a manner as the said Michael now enjoys and is in possession of the same, for the sum of £320 sterling paid to him by the said James O'Neill (party to the deed) as and for a marriage portion or fortune of his daughter the said Ellen O'Neill." That is the recital. The consideration is stated to be £320 to be paid to Michael, and the intention, as recited, is to convey to Martin; but then the witnessing part goes on "that for and in consideration of said intended marriage and said sum of £320 he the said Michael Hoban doth hereby for himself his executors administrators and assigns, covenant promise and agree to and with the said Martin his executors administrators and assigns, that he the said Michael doth hereby grant, bargain, sell, assign, and make over, unto the said Martin and Ellen O'Neill his intended wife, all that and those the hereinbefore recited lands and premises, together with the lease thereof, situate at Dangan aforesaid, &c., in as large and ample a manner as the same is held by said recited indenture of lease, and now in the possession of the said Michael, to have and to hold the same unto the said Martin Hoban and Ellen, his intended wife, their executors, administrators and assigns, for all the rest residue and remainder of said term of 199 years yet to come and unexpired, subject to the yearly rent and performance of the covenants in said recited lease reserved and made payable." Lastly, there is a clause that Michael, if he chose, should be at liberty to reside with Martin and Ellen; and a covenant by Michael that he had full power to make the conveyance, and for further assurance.

Now, the contradictions in the deed are obvious. It recites an intention to convey to Martin. The covenant or operative part (whichever it is) is in favour of Martin and Ellen the intended wife. There is a flat contradiction, but each of the two clauses in itself is perfectly clear. It is not a case in which we have to contrast an obscure witnessing part with a definite and clear recital. Where the witnessing part of a deed is perfectly clear it is not to be controlled by contradictory expressions in recitals. The rule is too well settled to require reference to authorities; but it struck

M. R.
1895.

LONERGAN
v.
HOBAN.

me on the whole of the deed and from its peculiar nature that it might be more strictly construed as being articles for a settlement than a settlement. However, the difficulty would then arise if it is not to be treated as a conveyance as to what the effect of it would be. How could the conveyance be framed if the Court were to direct a settlement to be prepared on the basis of the articles? I have little doubt that the manifest intention stated in the operative part and the *habendum* in the absence of proof of mistake or the like, would have to be carried out in that way. It is observable that Martin made no specific disposition of this farm by his will. Is it then to be construed as marriage articles merely? Grammatically there are no words of present gift unless you strike out the words of covenant, but grammatically and legally it is impossible to do that. It struck me therefore that that strengthens the assumption that the document is to be treated as articles; however, on looking into the cases I came to the conclusion that there is no reason to question that if it were dealing with freehold property the deed would be a good covenant to stand seised under the Statute of Uses, and would operate as a conveyance. *Doe* d. *Jones* v. *Williams* (1) is a case singularly like the present. It was a common law case in ejectment, where a stricter rule would be applied, and therefore that case is an *a fortiori* one to the present. There the deed was entitled articles of agreement, and recited that it wes covenanted and agreed that a marriage should be shortly solemnized; and then after other recitals it recited that it was also covenanted and agreed upon between the parties that the said Abel Jones (the father of the intended husband) "for the support and settlement in the world of the said young couple freely and clearly giveth and settleth upon his said son Griffith Jones" certain freehold premises, &c., from Michaelmas next for the term of his natural life, and after his decease to the use of the first son of the body of the said Griffith on the body of his intended wife to be begotten, and so on successively for all and every other son; and, in default of such issue male, like limitations to the daughters, and for want of such issue to the settlor's right heirs. It was argued in that case, as it has been argued here, that the articles of agreement were only an executory contract and could not give a legal estate in the premises; but the Court held that though the document was called articles it must be treated as a settlement, and that treating it as a settlement there was a good covenant to stand seised to the uses declared by the settlement, and that it passed the legal estate. Denman, C.J., says, "There does not appear in the deed any agreement to make a further settlement at a subsequent time; we therefore think that the contract on the part of Abel Jones must be construed as a covenant to stand seised to the uses declared in that settlement." And accordingly the Court made no rule on the motion for leave to enter a non-suit, holding that there was a good conveyance by virtue of the covenant to stand seised.

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(1) 5 B. & A. 783.

In dealing with a chattel interest there can be no question of seisin or under the Statute. But to put it on the lowest ground this covenant would be an absolute estoppel on the settlor, Michael Hoban, from alleging that he had not done what he covenanted he did do, and therefore I am of opinion that the estate passed by estoppel which binds Michael and all claiming under him. It is not suggested that Martin had any independent title, and therefore the question remains for decision whether there was a joint tenancy created by the deed in these two persons, who were not husband and wife at the date of its execution. They were then just as competent to take as joint tenants as any other two persons, and though, after the marriage, the husband Martin Hoban might have severed the joint tenancy at any time by reducing it into possession—selling the premises or the like—he did not do so, and the deed was left to operate in the ordinary course of law, and, in my opinion, in the absence of any proof of severance, the estate goes to the survivor. Did then the marriage which took place subsequent to the settlement alter the rights of the parties? If this had been a joint tenancy to which Ellen O'Neill was entitled along with any third person, there is no doubt that her marriage with Martin Hoban would not of itself be a severance of the joint tenancy. *Hughes* v. *Anderson* (1) and other cases make this point clear. Then would the marriage of the two joint tenants have any other effect? There is no authority for such a proposition. In my opinion it is clear that there has been no severance of the joint tenancy by the mere fact of marriage, and no other act of severance has been so much as suggested. I am, therefore, of opinion that under the provisions of the deed the wife having survived her husband became entitled to the entire residue of the chattel term by survivorship, and the farm of Dangan cannot be treated as assets of Martin.

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(1) 38 Ch. D. 286.

Another ground has been put forward to support the summons, and I think it better to express my opinion on it also, because, if I am erroneous in the view I have taken, and the case goes further, it is sufficient to entitle the applicants to succeed.

Assuming that the farm of Dangan was really assets of Martin Hoban, the question arises whether the settlement of 1892 had the effect of conveying a good title to a purchaser for value without notice. Nicholas O'Neill has been connected with all the proceedings in the case. He became the personal representative of Martin Hoban. He knew all about the different transactons. He was a party to the settlement of 1892, not as a conveying but as an assenting party. That settlement treats the farm of Dangan as the property of Ellen Hoban by one or other of two ways. The pendency of the suit for the administration of the assets of Martin Hoban rendered it contrary to the duty of the executor, and contrary to his powers and rights, to deal with the farm by sale or otherwise, and I am clearly of opinion that this old gentleman thought that the farm was assets of Martin and that he joined in the settlement with the intention of putting the farm away into the hands of a purchaser without notice, for the purpose of cheating the creditors of Peter Hoban and Martin Hoban. Mr. Feely had acted as solicitor for him and for the other parties: and upon the occasion of the arrangement connected with the intended marriage Feely was not consulted, and did not receive instructions to prepare the deed of 1892. Another solicitor was called in who knew nothing about the previous matters. On the day Mr. Thornton was consulted, Nicholas O'Neill went to Mr. Feely and ascertained that there was a decree for the sale of the farm. He had the fullest and most express notice of the trust. His sister Ellen Hoban was examined before me. She denied in an explicit manner that she had any notice or knowledge of the law proceedings about the estate of her husband. I do not believe one word of her denial. Nicholas O'Neill on his part made a clean breast of it. He stated she knew about the proceedings, and better than he himself; that he told her all he knew, and showed her every letter and paper he received relating to the suit, and that she used to take them away to show to Feely.

Another matter was put forward which I had better first dispose of. It was said by Mr. Price, that before the decree for the administration of Martin's assets was made there had been an assent by the executor which vested the farm of Dangan in Mrs. Hoban. There is no proof of that at all. That O'Neill left her remaining on the premises there is no question; but that falls short of any proof of assent by him as executor, having regard to the fact that she was living on the farm at the time of Martin's death.

There is no question that in 1892 he did by the deed assent to the legacy in the most precise manner. The only question is whether his assent at that time had the effect of passing the estate on to the purchasers. That turns wholly on the question of *bona fides* on the part of the trustees of the settlement of 1892, and the parties claiming under them. The persons in reference to whom this inquiry is important are, first, the trustees and, secondly, James Murphy and his wife. The evidence of the trustees has satisfied me that they had no notice of the administration suit, and that this was a *bona fide* marriage settlement entered into on the assumption that Mrs. Hoban had power to deal with the farm. The father of the intended wife would not have paid his £500 in order to facilitate Nicholas O'Neill and Mrs. Hoban in defrauding the creditors of Peter and Martin Hoban; and it was the interest of O'Neill and Mrs. Hoban to conceal any question as to the right to the farm from those who were intended to take as purchasers for value and without notice; and if the assent of the executor could validate the transaction it was properly validated.

It has been contended that the executor had no right to assent as there was a suit pending for the administration of the assets.

M. R.
1895.

LONERGAN
v.
HOBAN.

He had of course no right in one sense. He did assent, undoubtedly, during the pendency of the suit, making away with what he believed was assets of Martin Hoban and this would leave him personally liable to account as for a *devastavit* to the last farthing he possesses. But, that he had no right to do so in another sense, *i.e.* that he had no power to do it, is a different proposition. In my opinion, the existence of a decree for the administration of assets does not prevent an executor from giving assent to a legacy under circumstances like these, where the suit is not registered as a *lis pendens*. If that course had been adopted different questions might have arisen. In this case the suit was not registered as a pending suit. The statute 7 & 8 Vict. c. 90, s. 10, provides that "no *lis pendens* shall bind or affect a purchaser or mortgagee, without express notice thereof, unless and until, a memorandum or minute containing the name and the usual or last known place of abode and the title, trade, or profession of the person whose estate shall be intended to be affected thereby, and the Court of Equity and the title of the cause or information and the day when the bill or information was filed, shall be left with such officer so to be appointed as aforesaid, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*." The course provided by the section has not been adopted in this case, and therefore so far as this suit is concerned it was not registered, and therefore the statutory enactment deprives it, as being a *lis pendens*, of any effect whatever against a *bona fide* purchaser without notice. That is not the same thing as saying that an executor may give a valid assent to a legacy in the case of a pending suit for the administration of his testator's assets. But on this question, *Berry* v. *Gibbons* (1), is an *a fortiori* case to the present. And even if it could be questioned on any ground such as that the interest which was passed by the mortgage was not the legal interest (and I do not suggest that it could), it is a decision of the Court of Appeal, and no such question arises in the present case, because we are here dealing with a purely legal interest. *Berry* v. *Gibbons* (1) is a clear authority for

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(1) L. R. 8 Ch. App. 747.

M. R.
1895.
Lonergan
v.
Hoban.

the proposition that the existence of a suit for the administration of a testator's estate does not deprive his executor of the power to assent to a dealing with the assets in the case of a purchaser for valuable consideration without notice.

Solicitors for the applicants: *J. Thornton & Son.*
Solicitors for the plaintiffs: *A. G. Boyd.*

R. W. L.

M. R.
1896.
Feb. 7.

FITZSIMONS *v.* SKELLY.

Practice—Originating summons—Leave to substitute service—Affidavit—British subject.

On an application for liberty to substitute service of an originating summons where the defendant resides out of the jurisdiction, the order will not be made unless the affidavit in support of the application states that the defendant is a British subject.

Motion for an order to substitute service of an originating summons on the defendant who resided at 316, West 119th-street, New York, by serving his agent Mr. P. C. M'Gough, solicitor, of Dublin.

The affidavit of plaintiff's solicitor stated that the summons had been issued, and no appearance entered; that the defendant lived outside the jurisdiction, and that Mr. P. C. M'Gough acted as defendant's agent. The summons was brought to raise the amount of a charge created in favour of the plaintiff by the will of Henry Skelly, deceased, on the lands of Bigstown in the county of Meath.

W. H. Brown, in support of the application:—

[The Master of the Rolls:—There is no statement in your affidavit whether the defendant is or is not a British subject. How then can I make an order for substitution of service?]

We submit that in applications for substitution of service such a statement is unnecessary. The necessity for it arises only when it is proposed to serve a defendant out of the jurisdiction personally, in order to enable the Court to direct whether the document to be served should be a writ or a notice of the writ. The judgment of Jessel, M.R., in *Fowler* v. *Barstow* (1) is to this effect. The objection to allow substitution of service arises in a case where personal service of the writ could not legally be made—as, for instance—a writ in an action for tort under R. S. C. Ir. 1891, Order XI., R. 1.; *O'Connor* v. *The Star Newspaper Company* (2). In this case the summons, except for physical difficulties, might be legally served on defendant, as the lands, the subject-matter of the suit, are within the jurisdiction: Order XI. R. 1., ss. (*a*).

THE MASTER OF THE ROLLS:—

I make no rule on the application.

Solicitor for the plaintiff: *Marcus Purcell.*

R. W. L.

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(1) 20 Ch. D. 240. (2) 30 L. R. Ir. 1.

M. R.
1895.
Dec. 16, 18.
1896.
Jan. 15.

BRANNIGAN *v.* MURPHY.

*Will—Legacy—Condition subsequent—Charitable uses—Perpetuity—Impossibility of performance—*Cy près *doctrine—Railway "shares"—Railway "stock"—Misdescription.*

A testator made the following bequest:—"I give and bequeath to M. or the parish priest for the time being of St. Peter's Roman Catholic parish, Drogheda, towards building the Oliver Plunkett Church, two ordinary shares in the Great Northern Railway Company of Ireland, with an obligation that in consideration thereof the parish priest and curates for the time being of St. Peter's Roman Catholic parish, Drogheda, shall celebrate mass in public in the C. Church on each Monday morning for the repose of my soul and the souls of the deceased members of my family."

M. refused to take the legacy on the condition attached to it by testator, and stated it would be impossible to carry out this condition consistently with the due discharge of his other duties as parish priest. C. was a mortuary chapel adjoining Drogheda.

The Great Northern Railway Company never had "shares," but "stock" only. An affidavit was made by a member of the Stock Exchange, stating that £100 stock was often referred to as one share by members of the public, and that he himself would have no hesitation in reading an order to buy or sell "two ordinary shares" as £200 stock, and that, to his mind, it would bear no other interpretation:—

Held, that it was reasonably clear that the testator meant to bequeath £200 stock under the bequest of "two ordinary shares," and that the legacy passed to M. discharged from the condition of celebrating masses.

Held, that the obligation to celebrate masses in the C. Church was a condition subsequent, and being an attempt to create a perpetuity for a purpose which was not charitable, was wholly void.

Held, also, that the condition being impossible of performance without violation by the legatee of his duties as parish priest, was in law an impossible condition.

SUMMONS.

By his will dated 23rd April, 1894, Laurence Brannigan, made the following bequest—"I give and bequeath to Monsignor Robert Murphy, or the parish priest for the time being of St. Peter's Roman Catholic parish, Drogheda, towards building the

Oliver Plunkett Church, two ordinary shares in the Great Northern Railway Company of Ireland, with an obligation that in consideration thereof, the parish priest and curates for the time being of St. Peter's Roman Catholic parish, Drogheda, shall celebrate mass in public in the Chord Church on each Monday morning for the repose of my soul and the souls of the deceased members of my family."

Laurence Brannigan died 21st October, 1894, and probate of his will was granted to the plaintiff, one of the executors therein named, the other executor having duly renounced.

The defendant Monsignor Murphy, refused to take the legacy on the condition attached to it in the will. He stated in an affidavit that it was impossible to carry out, by himself and his curates, the obligation attached to the bequest in the Chord Church on each Monday morning, as a public mass was said in that church every Monday for the repose of the souls of the deceased buried in the cemetery surrounding that church. That this mass could not be exclusively used for the purposes desired by the testator; and a second mass could not be celebrated on that morning, owing to other imperative parish duties (1). The Chord Church was a mortuary chapel adjoining Drogheda.

The plaintiff as executor issued an originating summons under Order LV., Rule 4, for the determination of the following question:—"In the event which has happened, viz. the refusal by the Right Reverend Monsignor Murphy to perform the condition attached to the legacy bequeathed by the said will to him and to accept same on such condition, who thereupon becomes entitled to the said legacy, or in what manner should it be disposed of."

D. Kehoe, for the plaintiff, submitted the case for the decision of the Court.

Carton, Q.C., for Monsignor Murphy:—

The legatee is entitled to the legacy discharged from the condition sought to be attached to it.

A condition may be rejected if illegal, or impracticable or fantastic. This condition is void as an attempt to create a perpetuity for what, as the law stands, is not a charitable object and is incapable of enforcement: *Rickard* v. *Robson* (1); *Hoare* v. *Osborne* (2); *Re Rigley's Trust* (3).

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(1) The affidavit is fully stated in the judgment of the Master of the Rolls.

The condition constitutes merely an honorary trust and the gift is good discharged from all such obligation: *Dawson* v. *Small* (4); *Fisk* v. *Attorney-General* (5); *Sinnett* v. *Herbert* (6); *Hunter* v. *Bullock* (7); *Glasgow College* v. *The Attorney-General* (8).

The Court will not apply the *cy près* doctrine: *Fisk* v. *Attorney-General* (5); *Attorney-General* v. *Boultbee* (9); *Denyer* v. *Druce*, referred to in *Reeve* v. *Attorney-General* (10).

The condition is a condition subsequent which will be rejected, and there is then an absolute gift for a good charitable purpose: *Yates* v. *University College London* (11).

Clancy, for Susan Fullam, one of the residuary legatees.

Gifts for masses constitute a charitable use and therefore are not affected by the rule against perpetuities. The condition attached to this legacy does not involve a perpetuity at all. Practically the condition relates to *personæ designatæ*: see the observations of the Master of the Rolls in *Geary's Trusts* (12) as to the duty of the Court in construing doubtful words. And see *Armstrong* v. *Reeves* (13). The rule against perpetuities is not violated, for the money is given in a bulk sum, and may be spent at once: *Re Welstead* (14).

The condition here is valid and enforceable. It is a condition precedent. It is a legacy "in consideration of the legatee undertaking" to fulfil the obligation. The condition is effectual and must be performed or the legacy fails *in toto*: Jarman on Wills, vol. ii. 843, *Acherley* v. *Vernon* (15); *Gillett* v. *Wray* (16); *Harvey*

(1) 31 Beav. 244.
(2) L. R. 1 Eq. 585.
(3) 15 W. R. 190.
(4) L. R. 18 Eq. 114.
(5) L. R. 4 Eq. 521.
(6) L. R. 7 Ch. App. 232.
(7) L. R. 14 Eq. 45.
(8) 1 H. L. Cas. 800; 2 Coll. 665.
(9) 2 Ves. Jun. 380.
(10) 3 Hare, 194 n.
(11) L. R. 8 Ch. App. 454
(12) 25 L. R. Ir. 171.
(13) *Ibid.* 325.
(14) 25 Beav. 612.
(15) Willes, 153.
(16) 1 P. W. 284.

v. *Aston* (1); *Large* v. *Cheshire* (2). The Court will not on the *cy près* doctrine give effect to the gift, in case the condition is bad, unless a general charitable intention is shown. Here there is no such intention. The primary object of the testator was to have masses said for himself. Where the gift is conditional the *cy près* doctrine does not apply. If this condition is rejected as void the legacy also fails: *Cherry* v. *Mott* (3); *Chamberlayne* v. *Brockett* (4); *Attorney-General* v. *Bishop of Oxford* (5); *Moggridge* v. *Thackwell* (6).

Morphy, for the Attorney-General.

The Master of The Rolls:—

As far as I know there are no "shares" in the Great Northern Railway Company, and there never were any. I cannot decide the case without knowing what the property is.

Subsequently an affidavit of Mr. M'Cann, a member of the Stock Exchange, was put in evidence.

It stated, "Great Northern Railway Company stock, as at present described, has not, at any time, been dealt in as shares, although, with other descriptions of stock, £100 stock is often referred to as one share by members of the public. From my long and extensive dealing on the Stock Exchange, I would have no hesitation whatever in reading an order to buy or sell, 'Two ordinary shares' as £200 *stock*, in fact it would, to my mind, bear no other interpretation."

The Master of the Rolls:—

1896.
Jan. 15.

The will of Laurence Brannigan, dated the 23rd April, 1894, contains the following bequest:—"I give and bequeath to Monsignor Robert Murphy, or the parish priest for the time being, of St. Peter's Roman Catholic parish, Drogheda, towards building the Oliver Plunkett Church, two ordinary shares in the Great Northern Railway Company of Ireland, with an obligation that in consideration thereof the parish priest and curates, for the time being, of St. Peter's Roman Catholic Parish, Drogheda, shall celebrate mass in public in the Chord Church, on each Monday morning, for the repose of my soul and the souls of the deceased members of my family."

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(1) 1 Atk. 361.
(2) 1 Vent. 147.
(3) 1 My. & Cr. 123.
(4) L. R. 8 Ch. App. 206.
(5) 1 Bro. C. C. 444 n.
(6) 7 Ves. 36.

The affidavit of Monsignor Murphy, filed the 22nd November, 1895, states as follows:—"The testator was one of my parishioners, and an acting member of the committee formed for the purpose of raising funds for the building of said memorial church. The testator took a very warm interest in the building of said church to which he contributed various sums of money, from time to time, during the last ten years, and when making his will I believe testator intended to leave a generous donation towards the building and completion of the new church, because he told me so before his death. The Chord Church is a mortuary church, situate in the middle of the burial-ground which adjoins the town, and mass is only celebrated in it every Monday morning for the repose of the souls interred in the graveyard surrounding the said Chord Church. This church is also used on the occasion of burials for the usual services attending funerals. I say it is impossible to carry out the obligation attached to the said bequest, namely, by saying mass in public by myself and my curates in the Chord Church, on each Monday morning, inasmuch as a public mass is said in said church every Monday for the repose of the souls of the deceased buried in the cemetery surrounding the said Chord Church, and the mass so celebrated on each Monday morning could not be exclusively used for testator's intentions, and because a second mass cannot be celebrated by me or my curates in the Chord Church on Monday morning, owing to the fact that my curates and I have to discharge other public duties on that morning elsewhere, namely, we, in addition to the mass celebrated in the Chord Church on Monday morning, have to celebrate daily masses in the Parish Church, West-street, and the Presentation Convent, Drogheda. We have also to attend the sick and poor of my parish, which includes almost the entire town, and parts of the rural districts of Drogheda. I say that owing to our duties towards the parish, I and my curates could not possibly carry out the obligation attached to the legacy, but if the bequest be given towards the building of the new church, as a benefactor, the testator's intentions will be included in the masses publicly celebrated in the new church for all benefactors."

If it stood alone there could, of course, be no question as to the validity of the legacy itself, apart from the consideration as to whether its subject-matter is sufficiently certain to be capable of definite ascertainment. It is a gift of personal estate for the purpose of building a church, or assisting in its building. This was not questioned.

And Mr. Clancy, for one of the members of the family and a residuary legatee, did not question this: but argued that the condition also was valid and enforceable, and that as the condition is effectual it must be performed, or else that the legacy must fail.

In considering this question, it is obvious that so far as language can do it without using the word condition, the obligation to celebrate mass, as directed, is made a condition:—"With an obligation that *in consideration* thereof, &c." But it is equally clear this is a condition subsequent. The obligation is for all time, and its discharge cannot be a condition precedent to the vesting of the legacy. This is too clear for argument. Mr. Clancy, indeed, tried to construe the clause as if it had run, "in consideration of the legatee undertaking" to fulfil the obligation. If it could be so read, it would, no doubt, be a condition precedent; and would bear some resemblance to cases such as *In re Welstead* (1), where Sir John Romilly held that there was neither a condition precedent nor a condition subsequent, but a direction to apply the money bequeathed in purchasing a qualified right of presentation to a living. This could not be done, and the legacy failed. Here the language does not admit of any such construction. The legacy is to be spent, not in paying for masses, but in building a church. If any part of it were applied in paying for masses it would be a breach of trust. It is as plain a condition subsequent as it is possible to conceive.

Treating it then as such, is it legal? As the law now stands I think it is not. That it tends to create a perpetuity cannot be questioned, for the substance of the thing is that mass for a par-

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(1) 25 Beav. 612.

M. R.
1896.
BRANNIGAN
v.
MURPHY.

ticular intention shall be celebrated for ever, a matter which the Court cannot control or effect except through its power over property; and to connect it with the enjoyment of the property bequeathed would be to create a perpetuity in the latter. Being a perpetuity, it is therefore void as transgressing the policy of the law, unless it is saved from that consequence by reason of its being a valid charitable gift. But the celebration of mass for a particular intent is not *per se* a charitable object, even when the masses must be celebrated in public and so become an important part of public worship. I have on other occasions expressed my own view on this subject, which is in accord with the suggestion thrown out by the Lord Chief Baron in *The Attorney-General* v. *Delaney* (1), and is, that when the masses must be celebrated in public their celebration ought to be considered as being charitable, even though a particular intention for a special object is incorporated with the gift. But this view has not been adopted, and the law must be taken to be otherwise (2). If so, the condition which is interminable in point of duration, since no one can definitely find when the testator and all his family shall have ceased to need the benefit of the masses, is wholly void.

In the present case, too, the condition, even if not void on the ground I have stated, is impossible of performance without violation by the legatee of his other and (as I gather) his primary and most imperative duties as priest of the parish. A condition which is impossible without violation of duty is in this Court treated as simply impossible; and if a condition subsequent be impossible, the condition fails and the gift remains discharged from it.

A totally different question, however, suggested itself to my mind during the argument. The legacy is of "two ordinary shares" in the Great Northern Railway Company of Ireland. But there are not, and never were any ordinary shares, or any shares at all, of the Great Northern Railway. I happened to know this, having had, when at the Bar, some acquaintance with the various amalgamation Acts which had the result of constituting one great Company by a union of several—at least five smaller ones. These smaller constituent Companies may at one time have had shares, though, in the case of some at least, their shares had been converted into stock before the final amalgamation. But the Great Northern Railway itself never had shares at all, only stock. What, then, is an ordinary share in a Company which has no shares, and never had? Of course, when a testator had railway stock and no shares, a legacy of "all my railway shares," or "all my shares in a particular railway," is a gift of the stock which he in fact had. Whatever doubt there might have been upon this point is finally removed by the case of *Morrice* v. *Aylmer* (1), where it was broadly decided that the word "shares" will include stocks in the absence of a controlling context.

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(1) I. R. 10 C. L. 104.

(2) See *Attorney-General* v. *Hall*, decided February 21, 1896, and reported [1896] 2 I. R. 291.—[REP.]

But that is not my difficulty. Had this been a legacy of "all my ordinary shares in the Great Northern Railway," I should have felt none at all in holding that all his ordinary stock passed. But the difficulty is that the testator has given "*two* of my ordinary shares," &c. Had the stock of the Great Northern Railway consisted originally of say £10 shares, and had these £10 shares been converted into stock after the date of the will, it could hardly have been suggested that the legatee would have taken more than the equivalent amount of stock representing two £10 shares. Similarly, had there been £20, £50, or £100 shares. But the question is, how much stock is to be held to be denoted by two ordinary shares when there is no such circumstance to guide us? And if it could not be shown that there is some unit of amount, the gift would fail for uncertainty, not because stock would not pass under a gift of shares, but because there is nothing to show how much stock is intended—a difficulty which cannot arise when, as in *Morrice* v. *Aylmer* (1), the gift is of the whole.

The parties have treated the legacy as being a gift of £200 ordinary stock, treating £100 as being the unit; and I have little doubt that this was, in fact, what the testator meant. Stock Exchange quotations of stock of this kind are always based upon the £100. When you say the stock of a particular Railway Company is at £150, the meaning is that £100 stock will sell for

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(1) L. R. 7 H. L. 717.

£150. Thus, the £100 is the ordinary commercial unit. But that is not conclusive, for the same observation applies in the case of stock representing shares converted into stock. The stock is quoted by the hundred, though the shares may have been of a much smaller amount; and as the law stands, a legacy of "two ordinary shares" might, in such a case, give less than £200 stock. I allowed the matter to stand for evidence on this point as to the Stock Exchange user in such cases, and how an order to buy "two ordinary shares" in the Great Northern Railway of Ireland would be understood amongst those who deal in such commodities, and I have been furnished with a statement by Mr. M'Cann. He says:—"Great Northern Railway Company, Ireland, stock, as at present described, has not at any time been dealt in as shares, although, with other descriptions of stock, £100 stock is often referred to as one share by members of the public. From my long and extensive dealing on the Stock Exchange I would have no hesitation whatever in reading an order to buy or sell 'two ordinary shares' as £200 stock. In fact, it would to my mind bear no other interpretation."

That it would have "no other interpretation" would not be sufficient to decide the question, as a gift in a will must be intelligible in itself. But on the whole I am of opinion that in this case it is reasonably clear that the testator must have meant to give £200 stock, and the residuary legatee has not disputed this point.

Solicitor for the plaintiff: *Verdon.*
Solicitor for Susan Fullam: *Friery.*
Solicitor for the Attorney-General: *Warren.*
Solicitor for Monsignor Murphy: *James Smith.*

R. W. L.

In re THOMAS WARING, Deceased.
GREER v. WARING.
(1896. No. 111.)

M. R.
1896.
March 2.

Will—Annuity—Direction to pay—Charge on real estate—Exoneration of personal estate.

A testator devised and bequeathed all his real, freehold, and leasehold property in land, houses, or fee-farm rents to his son L., and, after giving certain legacies to his four daughters and others, he directed that his said daughters should reside with L. while they remained unmarried; and in case of any of them not agreeing to do so, the testator directed as follows:—"I direct that my son L. shall pay to them the annual sum of £200, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of £200; and in case all my said daughters shall marry, then the said annual sum shall cease."

The testator devised and bequeathed the residue of his property, real, freehold, and personal, to L., subject to payment of his debts, funeral and testamentary expenses, and appointed L. his executor. The testator died possessed of freehold and leasehold property, as well as ordinary personalty:—

Held, that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty.

Summons.

This was an application by way of originating summons taken out by George William Greer, the executor of Lucas Waring, deceased, for the determination of the following questions arising in the administration of the real and personal estate of Thomas Waring, deceased; namely, whether upon the true construction of the will of Thomas Waring, deceased, the lands of Tullyglush, being leasehold property passing under his will, or any other lands of the said deceased being of chattel tenure, are subject to, or charged with, the annual sum of £200 thereby directed to be paid in the events therein mentioned to the defendants Jane Waring, Henrietta Waring, and Georgina Waring. The facts of the case were as follows:—

The said Thomas Waring made his will dated the 1st April, 1873, in the words and figures following:—"I give, devise, and bequeath all and singular my real, freehold, and leasehold property in land, houses, or fee-farm rents of what nature or kind soever or wheresoever situate, and whether in reversion, expectancy or otherwise, with their appurtenances, according to the nature and tenure of the same premises, unto my eldest surviving son Lucas Waring, his heirs, executors, administrators, and assigns, for ever, according to the nature and quality of the several properties aforesaid, subject to an annuity of £50 late currency charged on the said lands by the will of my late uncle, Samuel Caulfield Waring in favour of Edward Waring, and to the mortgages and other charges created by me thereon, that is to say, a sum of £2300 charged by mortgage on Tullyglush, a sum of £1000 charged on the lands of Magheralin vested in the trustees of my daughter Louisa's marriage settlement; and in case my said son Lucas shall die in my lifetime leaving lawful issue him surviving then I devise and bequeath the said property in lands, houses, fee-farm rents, to such issue absolutely; and in the event that my said son Lucas shall die in my lifetime without leaving lawful issue then I give, devise, and bequeath the said property in lands, houses, fee-farm rents, to my second surviving son Robert Waring; and in case he shall die in my lifetime, leaving lawful issue, then I devise said property in lands, houses, fee-farm rents, to such issue absolutely; and in case both of my said sons shall die in my lifetime without leaving lawful issue him or them surviving, then I devise and bequeath said lands, houses, and fee-farm rents, to all my said daughters and their issue, share and share alike, regard being had to the share or shares which my daughters Louisa and Ellen have settled upon them by their marriage settlements.

"I give and bequeath unto my four unmarried daughters, Hester, Jane, Henrietta, and Georgina, the sum of £1000 each to be payable at my decease, and if any of my said daughters shall die in my lifetime then I direct her or their share to be divided between the survivors of my said four daughters, share and share alike. I give and bequeath unto my said son Robert Waring the sum of £3000 payable at my decease, and in case my said son Robert shall die in my lifetime then I give and bequeath the said sum of £3000 to my said four daughters and my said son Lucas, share and share alike. I direct and desire that so long as my said son Lucas and my said four daughters shall remain unmarried they shall live together, and in case my said daughters or any of them shall not agree to do so I direct that my son Lucas shall pay to them the annual sum of £200, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of £200, and in case all my said daughters shall marry the said annual sum of £200 shall cease. I further direct that the legacies of £1000 each to my said unmarried daughters shall be payable to each of them on attaining the age of twenty-one years or on the day of marriage, whichever shall first happen; and the said legacy of £3000 to my said son Robert shall be payable to him on his attaining the age of twenty-one years; and it is my will and desire that, and I do hereby declare that, it shall and may be lawful to and for my trustees from time to time to advance and pay all or such portion of the dividends, interest, and annual produce of said respective legacies so bequeathed to my said children as aforesaid or such part of the principal not exceeding one-third thereof for or towards their or any of their support, education, or preferment in the world, notwithstanding their or any of their legacies shall not then become payable, and as to all the rest, residue, and remainder of my property, whether real, freehold, or personal, or of whatever nature or kind soever and wheresoever situate, and whether in reversion, residue, or expectancy, I give, devise, and bequeath the same to my said son Lucas Waring, subject however to the payment thereout of my just debts, funeral, and testamentary expenses; and I do hereby authorize and empower my said trustees from time to time during the continuance of the said trust, when it shall be advisable so to do, to call in all or any of the said personal estate, and to invest the same, or such portion as shall be so called in, in the purchase of Government stock or in other good public or private security, to be held by them upon the trusts aforesaid, the receipt of said trustees to be at all times sufficient discharge for such moneys as may be called in as aforesaid, and said trustees shall not be chargeable or accountable for more than they shall actually receive, or for involuntary losses, and at all times to be at liberty to deduct and reimburse themselves all necessary expenses. I hereby nominate and appoint my sons-in-law Captain George Douglass and William Greer trustees of this my will and guardians of the persons and fortunes of such of my children as shall be under age at my decease, and I appoint my said son Lucas Waring executor of this my will."

The testator died on the 18th March, 1877, without having altered or revoked his said will, leaving his said son Lucas Waring, and his said three daughters Jane, Henrietta, and Georgina Waring, him surviving, and his will was duly proved by the said Lucas Waring on the 5th April, 1877. The testator was at the time of his death seised of certain freehold lands, including part of the townlands of Aughnafosker and Gortnamoney, containing 63A. 2R. held under a lease, dated 28th October, 1835, for thirty-one years and three lives, at a rent of £58 19*s.* which had since been fixed by the Irish Land Commission at £41, and which produced a net income of about £213 a year; and he was also possessed of the lands of Tullyglush, situate in the county of Down, under a lease for the residue of a term of one thousand years, at a rent of one peppercorn, which was sublet to tenants, and produced a net profit rent of £357 a-year.

After the death of the testator, his son Lucas Waring entered into possession of the said freehold and leasehold properties, pursuant to the terms of the said will, and his said three sisters resided with him for some years, but eventually in or about the year 1887 ceased to do so, and went to reside elsewhere. Lucas Waring after his sisters ceased to reside with him, paid them the sum of £200 a year as by the will directed until his death. His said sister Hester Waring died in the year 1873, but his other sisters the defendants Jane, Henrietta, and Georgina Waring, were still living and unmarried at the date of the application.

Lucas Waring, by his will, dated 19th June, 1894, appointed his brother Robert Percival-Maxwell Waring, and his nephew George William Greer, his executors and trustees, and devised and bequeathed all his property unto and to the use of his executors and trustees upon trust to raise by sale or mortgage, or by any other means, a sufficient sum of money to enable them, after payment of his debts, funeral and testamentary expenses, to pay the legacies and make the other payments therein mentioned, and the said testator appointed his said brother his residuary legatee and devisee. Lucas Waring died on 31st December, 1894, and probate of his will was granted to the said George William Greer on 17th July, 1895. Robert Percival Maxwell Waring, the other executor and the residuary legatee, survived the testator, but died intestate on 2nd February, 1895, leaving the defendant George Lucas Waring, his eldest son and heir-at-law, an infant him surviving. The applicant was desirous of selling the said lands of Tullyglush for the purpose of making the payments mentioned in the said will of the said Lucas Waring, and a question had arisen as to whether the said lands were subject to the said annuity of £200 which was payable to the defendants as aforesaid, or whether the said annuity was charged solely upon the real and freehold property which was devised by the said will of the said Thomas Waring in exoneration of the personal estate of the same testator.

Oulton, in support of the summons :—

The annuity is not payable out of the leaseholds, but only out of the freehold property, on which it is expressly charged.

Bates, for the defendants Jane, Henrietta, and Georgina Waring :—

The annuity is not a mere rentcharge, there is an express direction to Lucas Waring to pay it, and the fact that it is charged on the real estate is not sufficient to exonerate the personal estate, which is primarily liable.

S. L. Brown, for the defendant George Lucas Waring :—

The effect of the residuary gift to Lucas Waring is to charge all the personalty, including the leaseholds, with the annuity, as well as the freehold and leasehold property previously given to him.

[The following authorities were cited: *Patching* v. *Barnett* (1); *Creed* v. *Creed* (2); *Paget* v. *Huish* (3); *Lamphier* v. *Despard* (4); *Spurway* v. *Glyn* (5); *Welby* v. *Rockcliffe* (6); *Quennell* v. *Tur-*

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(1) 51 L. J., Ch. 74.
(2) 11 Cl. & F. 491.
(3) 1 H. & M. 663.
(4) 2 Dr. & War. 59.
(5) 9 Ves. 483.
(6) 1 R. & M. 571.

ner (1); *Johnson* v. *Brady* (2); *Ramsay* v. *Thorngate* (3); *Kilford* v. *Blaney* (4); *Jones* v. *Bruce* (5); *Lance* v. *Aglionby* (6); *Alldridge* v. *Lord Wallscourt* (7); Jarman on Wills, pp. 1156, 1484.]

THE MASTER OF THE ROLLS:—

I do not intend to encroach on the general principle, that if an annuity is given by a testator, and there is then a direction that it is to be paid out of a particular estate, such a superadded direction would not of itself exonerate the personal estate of the testator. But in the present will I think there is a clear intention to charge the annuity of £200 upon the real and freehold property only. The will commences with a devise and bequest of all the testator's real, freehold, and leasehold property in land, houses, or fee-farm rents, of whatever nature or kind soever, whether in reversion, expectancy, or otherwise, to his eldest surviving son Lucas Waring, his heirs and executors, &c., according to the nature and quality of the several properties, showing that the testator knew the distinction between real estate and leaseholds. The testator then specifies certain charges to which the said lands are already subject. Then follows a gift over in the event of his son Lucas dying in his lifetime, which did not happen; then he gives legacies of £1000 each to his four unmarried daughters, Hester, Jane, Henrietta, and Georgina, with a direction that the legacy of any daughter, dying in his lifetime, is to be divided amongst the survivors; then there is a legacy of £3000 to his son Robert, with a gift over, in the event of Robert dying in his lifetime, to his four daughters and his son Lucas, share and share alike. Then comes the clause on which the question turns: "I direct and desire that so long as my said son Lucas and my said four daughters shall remain unmarried they shall live together, and, in case my said daughters, or any of them, shall not agree to do so, I direct that my said son Lucas shall pay to them the annual sum of £200, said sum to be paid to them, or any of them, so long as they, or any of them, shall remain unmarried; and I charge all my real and freehold property with said annual sum of £200; and in case all my said daughters shall marry, the said annual sum of £200 shall cease."

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(1) 13 Beav. 240.

(2) 11 Ir. Eq. R. 386.

(3) 16 Sim. 575.

(4) 31 Ch. D. 56.

(5) 11 Sim. 221.

(6) 27 Beav. 65.

(7) 1 Ba. & Beat. 312.

Then come directions as to the payment of the legacies of £1000 and £3000 before mentioned, and then a gift of the residue to Lucas Waring, in these words:—"And as to all the rest, residue, and remainder of my property, whether real, freehold, or personal, or of whatever nature or kind soever and wheresoever situate, and whether in reversion, remainder, or expectancy, I give, devise, and bequeath the same to my said son Lucas Waring, subject however to the payment thereout of my just debts, funeral and testamentary expenses." The will concludes by appointing Lucas Waring executor.

I agree with the contention put forward by Mr. Bates and Mr. Brown, that if you read the will, stopping short after the direction to pay the annuity of £200 to the daughters, so long as they shall remain unmarried, and omitting the next clause, which charges the annuity on the real and freehold property, the annuity would be charged on the property given at the beginning of the will, namely the freehold *and leasehold* property. This would be so, not because there was any express charge on that property previously given, but because the direction to pay imposed a duty on the person who took the prior gift to pay the annuity, and therefore it is that the Court holds that if the legatee takes the benefit of the legacy, he does so only if he fulfils the condition on which it is given, and thus it is equivalent to a charge. But it can make no difference in the construction of the will whether the language which follows is all in one sentence or in two consecutive sentences: *Ramsay* v. *Thorngate* (1); the whole must be read together. It is to be noticed that there is no gift of an annuity to the daughters in express terms, but merely a direction to Lucas Waring to pay an annuity, and a charge of it upon the real and freehold property which had been devised to Lucas. If this part of the will can be cut in two, as has been contended, then you would have the annuity charged on the personal estate; but if you

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(1) 16 Sim. 578.

M. R.
1896.
GREER
v.
WARING.

do not cut it in two, it is clear that what the testator meant was, that Lucas should pay the annuity out of the real and freehold property devised to him. Otherwise, the mention of the real and freehold property is mere surplusage.

What then is the effect of the gift of an annuity payable out of and charged upon real and freehold property? It is to make it a rentcharge. If so, then the annuity is a specific interest in the lands devised, and the principle of *Patching* v. *Barnett* (1) applies. Further, *Lamphier* v. *Despard* (2) also applies, since there, as here, the intention was that the legacy should be paid out of the real estate. The residuary gift does not alter this. It has not been contended that the rule in *Greville* v. *Browne* (3) applies here.

If my construction of this clause of the will is right there can be no implied charge of the annuity on the personal estate; but it is a rentcharge payable out of the real and freehold property. Even if it is not a rentcharge, there is an indication that this annuity should be paid out of the particular property mentioned, and there is no indication that it should be paid out of any other fund. It has been said that the real and freehold property may be insufficient to pay the annuity, but, whether this be so or not, in my opinion the annuity is not charged on the leasehold property mentioned in the summons, and the question raised thereby must be answered in the negative.

Solicitors for the plaintiff: *Ussher & Watson.*

Solicitors for the defendants Jane, Henrietta, and Georgina Waring: *Johns, Bates, & Johns.*

Solicitors for the defendant G. L. Waring: *Moore & Johnston.*

W. L.

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(1) 51 L. J. Ch. 74. (2) 2 Dr. & War. 59. (3) 7 H. L. Cas. 689.

M'MECHAN *v.* WARBURTON.

(1893. No. 188.)

V.-C.
1894.
March 15, 16, 20.
Appeal.
July 28.

Voluntary deed—Rectification.

The Court will rectify a voluntary deed after the death of the donor where it is clearly shown that, through mistake, the deed failed to carry out the proved intention of the donor.

Action, claiming to have an indenture, dated the 24th September, 1891, and made between Eliza Jane Warburton, since deceased, of the one part, and the defendants Thomas Fisher and Thomas Cooney of the other part, rectified by including in the conveyance of certain hereditaments situate in Little Patrick-street, Little York-street, and George's-street, Belfast, therein contained, all other the hereditaments comprised in the Landed Estates Court conveyance, dated the 30th July, 1853, to be held upon the same uses as were in the said indenture of the 24th September, 1891, declared in respect of the said hereditaments therein comprised, and also by including an assignment of the sum of £562 ordinary stock of the Great Northern Railway of Ireland, and twenty-four shares in the Northern Banking Co., Limited, standing, at the date of the said indenture, in the name of the said Eliza Jane Warburton, to the trustees of the said indenture, upon trust, after payment thereout of the sums of £300, £150, and £180 in the said indenture mentioned, for the plaintiffs in equal shares. The plaintiffs claimed that the defendant Wm. R. H. Gregg might be declared a trustee of the said premises comprised in the said Landed Estates Court conveyance other than those mentioned in the said indenture of the 24th September, 1891, and might be directed to convey the same upon the uses above mentioned, and that the defendant John Warburton, the husband of the said Eliza Jane Warburton, might be declared a trustee of the said sum of £562 ordinary stock of the Great Northern Railway of Ireland and the said twenty-four shares in the Northern Banking Co. The defendant John Warburton was sued as administrator of the said Eliza Jane Warburton (who died intestate on the 19th June, 1892), and also in his personal capacity. The defendant W. R. H. Gregg was sued as her heir-at-law, and the defendants Thomas Fisher and Thomas Cooney were sued as the trustees of said indenture. It was proved that by mistake and inadvertence on the part of the solicitor for the settlor the premises Nos. 17, 19, and 21, Little York-street, Belfast, and also certain parcels of land in Patrick-street, and the sum of £562 ordinary stock of the Great Northern Railway, and the said shares in the Northern Banking Co., were omitted from the operative part of the said settlement, and that the omissions were contrary to the express instructions of the settlor, and that though she executed the settlement she never sanctioned or became aware of the said omissions.

Twigg, Q.C., *Meredith, Q.C.*, and *Oulton*, for the plaintiffs :—

A deed may be rectified after the death of the donor, though voluntary, on clear proof of mistake: *Lister* v. *Hodgson* (1); *Ellison* v. *Ellison* (2); Vaizey on Settlements, p. 1568; Godefroy on Trusts, p. 108; *Turner* v. *Collins* (3); *Lackersteen* v. *Lackersteen* (4); *James* v. *Couchman* (5); *Wright* v. *Goff* (6). This is not like a suit against a living donor to compel him to do something he is not willing to do. It is only doing for the donor what it was her manifest wish to do.

There is no fraud in this case, but the principle which governs cases of fraud should be applied where mistakes and misapprehension of the donor's instructions occur. Where a person is fraudulently prevented from carrying his intentions into effect the Court will see that all parties are placed in the same position as if he had done so: *White* v. *White* (7); *Middleton* v. *Middleton* (8); *Mestaer* v. *Gillespie* (9); *Langley* v. *Brown* (10); *Ramsbottom* v. *Gosden* (11); Story's Equity Jurisprudence, p. 116.

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(1) L. R. 4 Eq. 30.

(2) 1 White & Tudor L. C. (6th ed.), [291.

(3) L. R. 7 Ch. App. 329.

(4) 6 Jur. (N. S.) 1111; 30 L. J. Ch. (N. S.) 5.

(5) 29 Ch. D. 212.

(6) 22 Beav. 207.

(7) L. R. 15 Eq. 247.

(8) 1 Jac. & W. 94.

(9) 11 Ves. 638.

(10) 2 Atk. 203.

(11) 1 V. & B. 168.

Piers White, Q.C., and *F. Fleming*, for the defendant John Warburton :—

The Court will not enforce specific performance in favour of a volunteer. The same principle should be applied to reforming a deed at the instance of a volunteer. *Lister* v. *Hodgson* (1) is the only authority for reforming a voluntary deed after the death of the donor, and that was a case where the donor did not understand the instrument. There is no distinction in principle between reforming a deed in the lifetime of the donor and after his death. Where a settlement of shares is intended to be by transfer it could not be completed if no transfer was, in fact, executed. The 14th and 15th sections of the Companies Clauses Act regulate the transfer of shares. The Court has no jurisdiction to direct the transfer otherwise. [Counsel also referred to *Bridge* v. *Bridge* (2); *Phillipson* v. *Kerry* (3); *Broun* v. *Kennedy* (4); *De Hoghton* v. *Money* (5).] The Court will not rectify the deed by inserting an assignment of the shares. It would be useless, as the plaintiffs could not get transfers. As the deed was not to operate until after Mrs. Warburton's death, she did not mean to constitute herself a trustee of the shares.

Lawson, for the defendant Fisher, disclaimed. He had never acted as a trustee.

Molony, for the defendant Cooney, submitted to act as the Court should direct.

Blood, for the defendant Gregg, submitted to rectification, but asked that the sums of £150 and £180 should be raised and paid.

The Vice-Chancellor :—

March 20.

I am fully satisfied, upon the evidence of the solicitor—who is entitled to credit for the straightforward manner in which he gave that evidence, not seeking in any way to extenuate his own mistake, which has given occasion to the present dispute—that Mrs.

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(1) L. R. 4 Eq. 30.
(2) 16 Beav. 315.
(3) 32 Beav. 628.
(4) 33 Beav. 133.
(5) 35 Beav. 98.

Warburton deliberately intended to settle all the property she derived from her former husband Mr. M'Mechan in the manner expressed by the deed as to the portions of that property therein comprised. I also believe that she supposed that the deed fully carried out that intention, and executed it on the faith of its being a full and complete disposition of all that property, according to such intention. The plan of the deed which she instructed her solicitor to prepare was that the landed property should be conveyed by her to trustees, and that the Government and railway stock and bank shares should be allowed to remain in the executors of Mr. M'Mechan's will, and not legally transferred to the trustees of the deed, but that her beneficial ownership of them should be subjected to the new trusts which she so intended to impress upon them. The deed was not intended to be completed by formal transfers to the trustees. The draft of the deed was so prepared, but it was afterwards discovered, from the information of that lady to her solicitor, that the Government stock only was standing in the names of the executors, whereas the railway stock and bank shares had been transferred by the executors to her, and were then standing in her name. The draft originally contained an agreement by her that the executors of Mr. M'Mechan should hold all these stocks and shares, or the investments of the proceeds of any of them which might be sold by them in order to vary the investments, and which were to be reinvested in the names of the executors, upon the trusts and for the purposes declared by the deed. Her reason for this probably was that she did not wish her husband to know of this transaction, as she informed her solicitor, when asked by him whether he might communicate on the subject with her husband, that she preferred to tell him at her own time and in her own way. It was necessary to alter the draft to suit this state of facts, and here the mistake was made, and her solicitor candidly admitted that the omission of the railway stock and bank shares was altogether " a mistake and blunder " of his own. He left the recital of these bank shares and railway stock unaltered, save by inserting in it that they were standing in Mrs. Warburton's own name instead of in the names of the executors, leaving the recital of the Government stock as in the names of the executors; and he also struck out the bank shares and railway stock out of the direction to the executors to hold them and the Government stock on the trusts of the deed, but omitted to substitute any other provision to carry out the settlor's intention as to them. In order to carry out that intention, which certainly was not altered, he should have inserted a declaration of trust by her, equivalent to the direction originally given to the executors respecting them. I have no doubt that she intended to declare such a trust as to them; that she never changed her intention that they should be effectually subjected to the trusts of the deed, but without changing the legal ownership of them; and that she always to her death fully believed that this had been done.

It was contended by the defendant Warburton that, as this was a voluntary deed, this Court cannot interfere to rectify it in favour of volunteers. The elementary principle of this Court, that it will not interfere to enforce specific performance of an incomplete voluntary agreement, or to rectify an erroneous voluntary disposition of property in favour of a volunteer, is subject to this exception, that after the death of the donor it will interfere to rectify a disposition which is clearly proved to have, through mistake, failed to carry out the proved intention. The principle is, I think, more correctly stated by confining it to this, that the Court will not rectify a voluntary disposition *against* the donor. That it will do so *in favour of* a donor is shown by the case of *Lackersteen* v. *Lackersteen* (1), where a voluntary settlement was rectified by Wood, V.-C., at the instance of the settlor. This explains the view taken by Romilly, M.R., in *Lister* v. *Hodgson* (2), where he stated the exception I have mentioned in case of a deceased donor, that upon clear proof of the intention of the donor, which, by a mistake, was not correctly carried out by the instrument of gift according to such intention, this Court will interfere to correct the mistake, and thus act in favour of the intention. If the donor were living it would have, of course, been competent for him to consent to such rectification, or to dissent from it. If the latter, it could not be reformed against his will, for a volunteer must take the gift as he finds it; but after his death, and in absence of proof of any change of intention, it cannot be assumed that he would have dissented, and it might even be presumed that he would not dissent. In this view *Lister* v. *Hodgson* (1) is not a departure from the true principle, and it is certainly an authority for the plaintiffs on this point.

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(1) 30 L. J. Ch. (N. S.) 5. (2) L. R. 4 Eq. 34.

But next, it was contended that this action is not merely to rectify a mistake, but to supply an omission, and to perfect an incomplete dealing with these shares and stock, and that the Court cannot do this in favour of a volunteer. I had occasion to consider the law on this subject in the case of *West* v. *West* (2), which the defendant Warburton relies on as an authority against the plaintiffs. That case proceeded on an executed instrument, in its nature incomplete, and not intended to be complete, as it was to have been perfected by a formal transfer of the shares in question. I there held that the deed could not operate as constituting the donor a trustee, and also, subject to the result of an application to, or a proceeding against, the Railway Company to register the deed as a transfer, that the deed could not be regarded as a complete gift. In this case also I am of opinion that the deed, even if reformed, as sought by the plaintiffs, would not operate as a complete gift, and that I could not, as such, give effect to it. But there is the alternative, that Mrs. Warburton contemplated creating herself a trustee of these shares and stocks, and if so the gift would be operative. I have more difficulty upon this part of the case than the other. I have, however, come to the conclusion that she did so constitute herself. As I have already pointed out, she had no intention that any of these stocks should be formally transferred to the trustees of the deed, but that, on the contrary, they should continue to be held by the persons in whose names they stood upon the trusts created by it. This actually took place as to the Government stock. I do not see any distinction in principle between a direction by her to the executors, who held in trust for her solely and absolutely, to hold her beneficial interest thenceforth in trust for the persons whom she intended it for, including herself for life, and a declaration of like trusts by herself of the stocks and shares which she was found to have in her own name. I believe she had the same intention as to the railway stock and bank shares as she had as to the Government stock, and that she would, without hesitation, have declared that she so held the latter if she had known that it was necessary for her to do so. She was in my opinion, therefore, a trustee of them for the purpose of carrying out her clear intention, while, at the same time, she was unwilling to have them formally transferred, probably for the reason I have above suggested. I must therefore hold the defendant Warburton, as her administrator, to be a trustee of them, and bound to transfer them for the purposes of the deed.

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(1) L. R. 4 Eq. 30.

(2) 9 L. R. Ir. 121.

There was also a question as to the number of bank shares intended to be dealt, which, by another mistake, was stated to be four when she owned twenty-four; but her intention as to this is clear from her specifying in the deed the value of the shares she intended to deal with. The deed must therefore be rectified in this respect also.

The defendant Warburton makes no claim to any interest in the houses and ground in Belfast, and the heir-at-law admits the mistake as to the parcels stated in the deed, which must also be rectified.

T. H. M.

Appeal.
July 28.

The defendant Warburton appealed to the Court of Appeal (Walker, C., Fitz Gibbon and Barry, L.JJ.).

P. F. White, Q.C., and *F. Fleming*, for the appellant.

Twigg, Q.C., *Meredith, Q.C.*, and *Oulton*, for the respondents.

The Court unanimously affirmed the decision of the Vice-Chancellor.

Solicitors for the plaintiffs: *Hayes & Son.*
Solicitors for the defendant John Warburton: *Casey & Clay.*
Solicitors for the defendant Gregg: *Findlater & Co.*
Solicitor for the defendant Fisher: *J. C. White.*
Solicitor for the defendant Cooney: *T. F. Monks.*

G. Y. D.

Monroe, J.
1894.
Nov. 16, 19, 20, 23, 27.
Dec. 3, 4, 5, 11.

Appeal.
1895.
May 3, 4, 6, 7, 10.
June 25.

KEVANS *v.* JOYCE.

Unconscionable bargain—Reversionary interest—Estate falling into possession—Purchase of equity of redemption by mortgagee—Confirmation of prior dealings—English bankruptcy—Title of trustee—Redemption suit—Offer to redeem—Amendment—Costs.

A, who was a young man of improvident habits, and entitled in reversion, expectant on the death of his father, to an estate for life in certain lands, and in a mortgage for £3000 and a sum of £200 railway stock, applied to the defendant, who was a professional money-lender at high rates of interest, for an advance of £140 on the security of his reversionary property, and by deed, dated the 18th June, 1889, mortgaged it to the defendant to secure £140 principal and £5 stated to be agreed upon as the costs of making searches and preparing, stamping, and registering the deed, with interest at £60 per cent. He also gave a promissory note at six months for £140 2*s*. The mortgage was framed to secure future advances, including interest, with monthly rests, commission, and other charges, and included a power of sale exercisable without notice. On the occasion of this transaction the defendant advised A to have an independent solicitor to act for him, but A declined to do so, and signed a document to that effect. A having been subsequently informed by the defendant that the mortgage had been stamped to cover an advance of £400, borrowed a further sum of £260 from the defendant, and gave a promissory note for the amount, payable in three years. A policy of insurance for £800 was effected on A's life, and was assigned to the defendant. In October, 1889, A borrowed a further sum of £140, and on the 17th October, 1889, he executed to the defendant a further mortgage of his said reversionary property to secure the repayment of this amount at £60 per cent. interest, with a proviso that the amount should not be paid off for three years without the defendant's consent. Another policy of insurance was effected on his life for £400, and assigned to the defendant. The premiums on the policies were charged on the mortgaged property.

On the 17th July, 1890, a writ was issued by A in the Chancery Division to set aside the two deeds of mortgage and the promissory notes upon payment of the principal amount advanced and £5 per cent. interest. A statement of claim was delivered on the 5th March, 1891, but no further steps were taken in this action. In January, 1891, A's father died, and A, who had borrowed a large sum of money, after the defendant's advances, from London money-lenders, and was desirous of leaving the country, had an interview with the defendant with the view of disposing of his equity of redemption in the mortgaged property. The defendant agreed to give him £250 as an advance on the mortgages and £120 as the consideration for the purchase. On the 31st March, 1891, A signed an agreement, whereby, in consideration of an advance of £250 repayable on the 13th July, 1892, he confirmed the deeds of mortgage of the 18th June, and 17th October, 1889, and undertook to change his solicitor, to discontinue the Chancery action, and to appoint the defendant mortgagee in possession. On the 3rd April, 1891, A executed a deed conveying the equity of redemption to the defendant in consideration of £120. A then appointed a new solicitor in the Chancery action, who, by his instructions, entered a rule to change, and discontinued the action. A received the money from the defendant and went abroad. He was adjudicated bankrupt by his English creditors on the 19th April, 1892, and the plaintiff was appointed trustee.

The defendant having presented a petition for sale of the lands in the Land Judge's Court on foot of another incumbrance, the plaintiff, on the 15th February, 1893, brought an action to set the mortgages of 18th June and 17th October, 1889, the agreements of 31st March, and the conveyance of the 3rd April, 1891. The statement of claim, as delivered, did not contain any offer to redeem.

At the trial of the action, upon oral evidence, Monroe, J., arrived at the following conclusions of fact:—

I. As regards the mortgages and assignments of the policies—(*a*) that the several transactions were entered into at the instance of A, and not by the inducement of the defendant; (*b*) that A understood the nature and material parts of the contracts, except the provision as to monthly rests; (*c*) that A was not advised by any independent solicitor, but that this was his own fault; (*d*) that A was not suffering from any pecuniary pressure beyond that he was reckless and improvident, and ready to accept money on any terms to supply him with the means of dissipation; (*e*) that the property comprised in the mortgages of the 18th June, 1889, and the 17th October, 1889, with the policies of insurance, gave ample security for the money advanced.

II. As regards the sale of the equity of redemption—that at the time of the conveyance of April, 1891, A had no idea of the charges on his property, or what the equity of redemption was worth, and that he was at that time deplorably at a loss for money.

Upon these conclusions of fact Monroe, J., *held*:—

1. That the mortgages of the 18th June, 1889, and 17th October, 1889, were hard and unconscionable bargains, and should only stand as securities for the amounts advanced, and interest at 5 per cent.

2. That, as regards the transaction of April, 1891, and the agreements immediately preceding it, A and the defendant were not on an equal footing, and that it therefore lay on the defendant to show that the bargain was fair and reasonable, and that the property was not sold at an undervalue; and the Court being of opinion that the purchase-money was grossly under the value

Monroe, J.
1894.

KEVANS
v.
JOYCE.

of the property sold, *held* that the conveyance of the 3rd April, 1891, should also stand as a security only for the amounts advanced and interest at 5 per cent., and that there was no valid confirmation of the mortgages of 1889.

3. That it was not competent for the defendant to question, in the present action, the validity of the English bankruptcy proceedings, and the consequent title of the plaintiff as trustee to sue, even on the grounds of champerty and maintenance by the creditors who obtained the adjudication.

The decision of Monroe, J., on these points was affirmed by the Court of Appeal.

Observations upon a mortgagee purchasing the equity of redemption from a mortgagor at an undervalue.

Monroe, J., gave the plaintiff leave at the hearing to amend the statement of claim by inserting an offer to redeem, though resisted by the defendant.

Monroe, J., directed each party to abide their own costs of the action. His Lordship's decision in this respect was not altered by the Court of Appeal.

TRIAL OF ACTION.

The plaintiff sued as trustee in bankruptcy of Henry Walter Smith, under an adjudication of the English Bankruptcy Court.

The statement of claim sought to have it declared that certain indentures of mortgage, dated respectively 18th June, 1889, and 17th October, 1889, and certain assignments of policies of insurance on the life of the said Henry Walter Smith, together with two agreements, each dated the 31st March, 1891, and a deed of conveyance, dated the 3rd April, 1891, should stand as securities only for the moneys advanced by the defendant to the said Henry Walter Smith, with interest at 5 per cent. The statement of claim did not offer to redeem the defendant on these terms, the plaintiff's advisers considering that, as there would be sufficient funds to the credit of the estate of the said Henry Walter Smith, which had been sold in the Land Judge's Court, to satisfy the defendant's claim on this basis, such an offer was unnecessary; and it was admitted at the bar that the statement of claim had been deliberately prepared in this way.

At the hearing, which occupied several days, numerous witnesses were examined, including Henry Walter Smith, the plaintiff Mr. Kevans, the defendant, and persons in his employment, and a vast quantity of correspondence was put in evidence.

The material facts, as well as the arguments of counsel, are fully reviewed in the judgment of Mr. Justice Monroe, and the following short summary of the learned Judge's notes of the evidence will afford a sufficient prefatory outline of the circumstances under which the suit was instituted.

Monroe, J.
1894.
Kevans
v.
Joyce.

Henry Walter Smith, whose estate was the subject of a petition for sale in the Land Judge's Court, was formerly a sergeant in the 14th Hussars, and, at the time of the transactions impeached, was about twenty-eight years of age.

Under an indenture of settlement, dated the 15th April, 1857, he was entitled to an estate for life in remainder, expectant upon the determination of the life estate of his father Richard Jeremiah Smith, in the town and lands of Drumsawny, otherwise Summerhill, in the county of Meath, held under two indentures of fee-farm grant, dated respectively the 25th March, 1862, at the respective yearly rents of £75 5*s.* 1*d.*, which yielded a profit rent of about £400 a-year; and in a sum of £2000, secured by a mortgage, dated the 16th February, 1855; and also to a life interest, expectant on the death of his father, in a sum of £1000, secured by a mortgage, dated the 30th August, 1855; and in a sum of £200 Great Southern and Western Railway stock, with divers remainders over. The inheritance of the lands was subject to a contingent jointure of £200 a-year for his mother, then aged about fifty-nine years, which afterwards became payable, and the same and the said sums of £2000, £1000, and £200, were subject to a mortgage to secure £1000 with interest thereon; and Henry Walter Smith's life estate in the lands and ultimate remainder in fee-farm were subject to a mortgage for £150, and interest thereon.

The defendant Joyce was a well-known money-lender at high rates of interest in Dublin, and was in the habit of publishing and circulating advertisements offering loans on reversionary interests in property. Smith, having seen one of these advertisements, applied to the defendant Thomas Joyce by letter, dated the 26th November, 1888, for the loan of £170 on what he described as the reversion in a sum of £3200 lent on Irish security then about being sold. Smith was then in urgent need of money, and came over to Dublin to try to effect the loan. He was introduced to Mr. M'Minn, Joyce's solicitor, at the "Express Bank," Stephen's-green, Dublin, who took down some memoranda from Smith respecting his title to, and the charges affecting, the said property. Joyce had in the meantime made some inquiries and registry searches, and agreed to advance the sum of £140 at the rate of £60 per cent. per annum upon the security of Smith's reversionary interest and his promissory note payable at six months after date.

Joyce suggested to Smith the propriety of taking legal advice before signing any document, but Smith declined to do so, and Smith then executed a mortgage, dated the 18th June, 1889, whereby he mortgaged to Joyce all his life estate in the lands comprised in the settlement of the 15th April, 1857, subject to the charges and incumbrances mentioned in the schedule, and all other lands and hereditaments to which Smith then was, or might thereafter become, entitled, to secure £140 2*s.* and £5 (a sum agreed upon for costs), with interest thereon at £60 per cent., and all other sums which should at any time become due or owing by Smith to Joyce (including interest, with monthly rests, commission, and other customary charges). Smith also, by the deed, assigned to Joyce the mortgage debts of £2000 and £1000, and the sum of £200 railway stock, subject to the life interest of the said Richard J. Smith in these sums. This mortgage gave the mortgagee a power of sale without notice in default of payment, and Smith thereby covenanted to pay the £140 2*s.* and £5 on the 21st December then next with interest, and further interest on said sums till paid, and any further advances with interest. This mortgage was on a printed form habitually used by Joyce, the blanks being filled up in ink. It was read over to Smith before he executed it. The Court was of opinion that Smith understood the material parts of this instrument except the clause about monthly rests, which Joyce in his evidence said was never intended to be, nor was in fact, enforced.

At the same time Smith signed a promissory note in favour of Joyce for £140 2*s.*, payable at six months, and received from Joyce £140 in cash. Smith requested Joyce not to register the deed in the Registry of Deeds, because it would thereby come to the knowledge of Messrs. Dudgeon & Emerson, his family solicitors, who were then endeavouring to procure for him a loan of

£1000; but Joyce informed him that it must be registered. In consequence of the mortgage to Joyce appearing on the registry the proposed loan for £1000 fell through.

Smith returned to England, and on the 21st June, 1889, received a letter from Joyce, stating that the mortgage had been stamped to cover advances up to £400; that Smith could have further advances up to that amount, and offering to leave the amount of such additional advance outstanding for two or three years. Smith had not at that time sought for any further advance, but immediately on getting the letter he applied to Joyce for a further advance of £260, and, after some correspondence, Joyce agreed to advance this sum, the amount to be secured by a promissory note, payable in three years, and by a policy of insurance for £800, the premiums of which were to be charged on the property, and were also to carry interest at £60 per cent.

The policy of insurance was effected and assigned to Joyce by deed, dated the 4th October, 1889. The money was paid to Smith on the 12th July, and he went to the south of Europe, whence he returned in August, having spent the money. He then applied to Joyce for a further advance of £140, and to allow the amount to remain outstanding till his father's death. Joyce agreed to advance a further sum of £140 on the security of the reversion and a further policy of insurance for £400, but refused to allow it to remain out until the death of the mortgagor's father. A mortgage was executed on the 17th October, 1889, charging the property comprised in the deed of the 18th June, 1889, with the payment of £140 4*s*. and the sum of £8 for costs, with interest at the rate of £60 per cent. per annum, and substantially in the form of the mortgage of the 18th June. A policy of insurance for £400 was effected on the 23rd October, 1889, with the London, Liverpool, and Globe Insurance Co., at the premium of £9 7*s*. for the first five years and £14 14*s*. afterwards, and the policy was assigned to Joyce by deed of the 26th October, 1889. Smith also gave Joyce a promissory note at three years for £140 4*s*., bearing interest at £60 per cent.

In November, 1889, Messrs. Dudgeon & Emerson received instructions from Smith to raise money to pay off Joyce, and accordingly obtained from Joyce, on the 3rd December, an account showing £579 14*s.* 6*d.* due for principal, and £785 8*s.* 4*d.* due for interest, making a total of £1365 2*s.* 10*d.* Joyce stated that interest must be paid on the notes down to the date of their maturity. Dudgeon & Emerson were not able to effect the proposed loan, and, on the 18th November, 1889, Smith sent a telegram to Joyce—"Can you let me have £200, urgent? Any terms; negotiations over." He also wrote to Joyce on the same day from Canterbury. During the negotiations for the loan Joyce, on the 2nd December, 1889, wrote a letter to Smith, in which he said—"If you are selling your reversion let us know what you are getting for it before closing, and perhaps we may do better for you, and be prompter, with cash down." On the 7th December, 1889, Joyce advanced to Smith a sum of £50 on the security of a promissory note of that date for £236 9*s.* 3*d.* payable in three years, with interest at £60 per cent., which included the principal sums of £140 2*s.* and £5, secured by the mortgage of the 18th June, 1889, and interest at £60 per cent. up to the 7th December, 1889. On the 14th March, 1890, Joyce advanced to Smith a further sum of £30, for which Smith gave a note at three months, bearing interest at £60 per cent. per annum.

In the month of March, 1890, Smith was residing in London, and living a very loose and reckless life, when he saw in a newspaper an advertisement addressed to "Heirs in distress," and he called on a Mr. Higgins, to whom application was directed to be made. Higgins introduced him to Hill, a solicitor, who had a valuation made of Smith's interest in the property, and who advised Smith that the transactions with Joyce would be set aside by a Court of Equity.

Hill introduced Smith to another firm of solicitors, Hicks & Arnold, and, as money was necessary to finance the litigation, application was made to Messrs. Isaacs & Edwards, carrying on business as the Union Deposit Bank. Smith was also introduced to a Mr. Lewis and a Mr. Bowden, money-lenders, and to all of these men he gave mortgages on his property at interest varying from £60 to £300 per cent. Hicks & Arnold instructed Mr. Rosenthal, a solicitor in Dublin, to institute proceedings to set aside the several transactions with Joyce, and, on the 29th March, Rosenthal wrote to Joyce, offering him the amount actually advanced, with interest at £5 per cent. This offer was refused. On the 17th July, 1890, a writ was issued on behalf of Smith, as plaintiff, against Joyce, impeaching the transactions. The statement of claim was delivered on the 5th March, 1891. While these proceedings were pending Smith, in October, 1890, without the knowledge of Rosenthal, renewed his negotiations with Joyce for the sale of his reversion. His father Richard J. Smith died on the 2nd January, 1891. On the 9th March, 1891, Joyce wrote to Smith offering to purchase his interest in the equity of redemption. This resulted in an arrangement for an advance of £250 on the terms of H. W. Smith confirming the deeds of mortgage, of the discontinuance of the action, and on the security of a promissory note of the same date at one year three months and thirteen days after date, bearing interest at £60 per cent. per annum.

In pursuance of this arrangement the two following documents were executed by Smith in Joyce's office :—

[No. 1.]

31*st March*, 1891.

To THOMAS JOYCE, 121, Stephen's-green, Dublin.

I propose to borrow from you a further sum of £250 5*s*., payable on the 13th day of July, 1892, on the security of my deeds of mortgage to you of the 18th June, and 17th October, 1889, which deeds of mortgage I confirm in every respect. In consideration of your agreeing to make me this further advance I agree and undertake to immediately change my solicitor, and have the action in the Chancery Division now pending against you discontinued. I also ask you to agree to extend the time for payment of my promissory note for £30, now overdue, till the 16th day of July, 1892, and for the consideration aforesaid I hereby appoint you mortgagee in possession till such time as the last due of my promissory notes to you shall become payable (viz. 10th December, 1892), fully empowered to receive the rents, profits, and interest due now, or to become payable, on the aforesaid mortgaged property, and to apply same after all proper outgoings in reduction of the interest accruing on my said mortgages to you.

HENRY WALTER SMITH. [*Seal.*]

Signed and sealed by the said Henry Walter Smith in presence of

HENRY DUGGAN, etc.
ARTHUR EUSTACE, etc.

I agree to extend your promissory note as within mentioned, and also to

Monroe, J.
1894.

KEVANS
v.
JOYCE.

make you the further advance of £250 on notice of discontinuance of action being served, and accept and agree to foregoing agreement.

THOMAS JOYCE, 121, Stephen's-green.
31*st March*, 1891.

Witnessed, etc. HENRY DUGGAN.
ARTHUR EUSTACE.

[No. 2.]

I propose to sell to you absolutely my equity of redemption in the property, moneys, and interest mortgaged to you, for the sum of £370, or further, to advance additional £250 on my deeds to you, and then I sell for £120 for all equity of redemption, including interest and rent now due.

HENRY W. SMITH.

This agreement witnesseth that whereas I am now entitled in possession to a life estate in the income of certain lands and hereditaments, which are more particularly set forth in the first and second parts of the first schedule of a deed of mortgage executed by me to Thomas Joyce, of 121, Stephen's-green, Dublin, Banker, and dated the 17th day of October, 1889, which said lands are subject to an annuity for life to my mother of £200 per annum, and to a mortgage for £1000 in priority to my life estate.

And whereas I am also entitled to a life estate in the interest and income of a sum of £3200, more particularly mentioned in the third schedule to said deed of mortgage of the 17th October, 1889. Now I hereby propose and agree to convey to you, Thomas Joyce, of 121, Stephen's-green, Dublin, or to any person you may direct, all my right, title, estate, and equity of redemption in the before-mentioned lands and hereditaments, and in the income thereof, and also all the said moneys, and interest thereof, together with all rents and interest now due to me, with full power to sue for, receive, and give discharges for same, and I undertake to execute to you immediately, or such person as you may direct, a proper legal conveyance. The consideration to be paid to me by you on such assignment is the sum of one hundred and twenty pounds, which sum, together with the sum of £2326 4*s.* 4*d.*, which will be the total of the sum due on my two mortgages to you when same fall due; together with a further sum of about £73 2*s.* paid for premiums, shall constitute the purchase price, but without any merger of said securities.

HENRY W. SMITH.
31*st March*, 1891.

Signed by the said Henry W. Smith, in the presence of

HENRY DUGGAN, 167, Clonliffe-road, Dublin, Cashier.
ARTHUR EUSTACE, 15, Walton-terrace, St. Ignatius-road, ublin, Commercial Clerk.

After these agreements had been prepared and executed, Joyce insisted that before executing the contemplated conveyance Smith should have the advice of a solicitor upon the transaction. Smith objected to the delay which would be thus caused, protested that there was no necessity for it, and absolutely refused to have any communication with either Mr. Rosenthal or Messrs. Dudgeon & Emerson. Ultimately Mr. C. Walsh was selected. He was a solicitor who had some slight acquaintance with Joyce, but none at all with Smith, and had no previous knowledge whatever of the dealings between Smith and Joyce or of Smith's property. Joyce gave Mr. Walsh the two agreements of the 31st March, 1891, the mortgages of the 18th June, 1889, and 17th October, 1889, the assignments of the policies of assurance, and the statement of claim which had been delivered. The intervention of Mr. Walsh in the matter is minutely described in the judgment of Mr. Justice Monroe. It is sufficient to state here that the Court was of opinion that it was impossible for him to give any advice which would be of value. He did endeavour to dissuade Smith from entering into the transaction, but Smith persisted in having it carried out at once, and refused to let Mr. Walsh have any conference with Mr. Rosenthal. By Smith's urgent and express directions Mr. Walsh prepared the draft conveyance next hereinafter mentioned, entered a rule to change Mr. Rosenthal as solicitor in the Chancery suit, and entered and served a rule to discontinue it.

On the 3rd April, 1891, the conveyance was executed by Smith. It was in the following terms:—

This indenture, made the 3rd day of April, 1891, between Henry Walter Smith, of Dudley Villas, Upper Richmond-road, Putney, in the county of Surrey, in England, gentleman, of the first part, Henry Duggan, of 167, Clonliffe-road, in the city of Dublin, cashier, of the second part, and Thomas Joyce, of 121, St. Stephen's-green, in the city of Dublin, banker, of the third part.

Witnesseth, that the said Henry Walter Smith, in consideration of the sum of £120 this day paid to him by the said Thomas Joyce, the receipt whereof by the said Henry Walter Smith is hereby acknowledged, doth hereby, as beneficial owner, grant, convey and assign absolutely to said Henry Duggan all his equity of redemption in the lands and hereditaments, and in the sums of money and interest thereon, and shares, as more particularly described in the schedule hereto, and also in the schedule to a deed of mortgage from said

Henry Walter Smith to said Thomas Joyce, dated 17th October, 1889, to hold to the said Henry Duggan, in trust for said Thomas Joyce; and the said Henry Walter Smith further, as beneficial owner, assigns absolutely to said Henry Duggan, to hold in trust for said Thomas Joyce, all rents now due out of the lands and hereditaments, and all interest and dividends now accrued on the sums of £2000, £1000, and £200, mentioned in the schedule hereto, and hereby granted, conveyed and assigned, with power to demand, sue for, and give valid receipts for the same in the name of the said Henry Walter Smith, or of the said Henry Duggan. And it is hereby declared and agreed that nothing herein shall be construed as a merger of any securities held by the said Thomas Joyce from the said Henry Walter Smith.

In witness whereof, &c.

[Schedule appended. Same as in mortgage deeds.]

This conveyance was registered in the Registry of Deeds Office on the 6th April, 1891.

Smith having obtained the £250 and the £120 from Joyce, went to Bechuanaland, in South Africa, and joined the police force there. On the 10th March, 1892, he was adjudicated bankrupt by the English Court of Bankruptcy, and Kevans was appointed trustee in the bankruptcy.

Upon evidence which was elicited during the cross-examination of the plaintiff, Mr. Kevans, by *Ronan, Q.C.*, the validity of the adjudication was strongly impeached by the defendant's counsel.

This evidence is fully stated by Mr. Justice Monroe, *infra*, pp. 459, 460.

In June, 1891, Joyce purchased a charge on the lands of Drumsawny, created by mortgage, dated the 8th January, 1890, and caused it to be conveyed to Henry Duggan by indenture dated the 27th June, 1891, and, on the 22nd June, 1892, a petition for sale of the said lands, on foot of the said incumbrance, was presented to the Land Judge. A conditional order for sale was made on the 8th November, 1892, and Kevans showed cause against making it absolute. On the 6th February, 1893, an order was made, giving the petitioner leave to amend the petition and conditional order by adding the plaintiff as an owner, directing that the conditional order should thereupon be made absolute, and that Kevans should be at liberty to institute proceedings in the

Chancery Division to impeach the securities of Joyce, and that such writ should be assigned to the Land Judge's Court.

Serjeant Dodd, *Houston*, *Q.C.*, and *Jefferson*, for the plaintiff.

The Right Hon. John Atkinson, *Q.C.*, *Kenny*, *Q.C.*, *Ronan*, *Q.C.*, *Wylie*, *Q.C.*, and *Godley*, for the defendant.

Houston, *Q.C.*, in replying, asked for liberty to amend by inserting in the statement of claim an offer to redeem.

Ronan, *Q.C.*, for the defendant, objected to the amendment being allowed, on the grounds that the application was too late; that the omission had been deliberately made, and that the evidence showed that the plaintiff had no intention to redeem.

Monroe, J. :—

Dec. 11.

The action in this case was instituted to set aside certain mortgages, contracts, a deed of conveyance, notes and bills, and assignments of certain policies of insurance, under the following circumstances :—

Henry Walter Smith, whose trustee in bankruptcy is the plaintiff, was, in the year 1888, a sergeant in Her Majesty's 14th regiment of Hussars, and was then about twenty-eight years of age. He was entitled, under a deed of settlement, dated the 15th April, 1857, to an estate for his life in remainder, expectant upon the life estate of his father Richard Jeremiah Smith, in the lands of Summerhill in the county of Meath, held under two fee-farm grants, and in a sum of £3000 secured on mortgages of land in Ireland, and also in a sum of £200 stock of the Great Southern and Western Railway Co. of Ireland. Having seen an advertisement of Mr. Thomas Joyce, that he was willing to lend money on reversionary interests, he wrote about November, 1888, to Mr. Joyce, asking for an advance of £170. Nothing, however, came of this application at the time. Smith left the army in 1889, and came over to Dublin about the month of June. He had then no employment of any kind. He owed some small sums of money, not exceeding £100 ; but he had formed some very undesirable acquaintances, and was entering on a career of dissipation. He called on Mr. Joyce and asked for a loan, first of £60, then of £100, and finally of £140. Some inquiries were made about his property, some searches were also made, and Joyce consented finally to lend him £140 on the security of a mortgage. Joyce, who is a banker or money-lender, had and used a printed form of mortgage, which he gave Smith to read. Smith read it wholly or partially. The rate of interest invariably charged by Joyce, as appeared by his prospectus furnished to Smith, was £60 per cent., and this was agreed to. Joyce suggested that before executing any document Smith should have the assistance of an independent solicitor, and the name of a Mr. Emerson, who was then endeavouring to raise a loan for Smith or his family, was suggested; but Smith declined to have any assistance, and signed a paper to that effect. A mortgage was then prepared by Mr. M'Minn, a solicitor acting for Mr. Joyce, residing on the premises, and receiving a weekly salary for his services. The mortgage, bearing date the 18th June, 1889 (one of the documents now impeached), recited that Smith had given his promissory note for £140 2*s.*, payable six months after date, at 60 per cent., and had agreed to secure this amount and a sum of £5 for costs, with interest at the rate aforesaid. Smith, as security for this and any other sums which might be thereafter advanced, with interest thereon at 60 per cent., assigned all his reversionary interest in the lands of Summerhill, and in the sum of £3200, and any property of which he might thereafter become possessed. The deed provided, in addition, for the payment of the interest, with monthly rests, commission, and other customary charges; and a power of sale without notice was given, should any default in payment be made. The main clauses of this deed, when drafted, were read and explained to Smith before execution. He then executed it, and got the £140 in cash. There is some little controversy in the evidence as to what took place before the execution of the deed; but I am satisfied that Smith understood its material provisions, with the exception of the clause about monthly rests. He is a young man of more than average intelligence; but even Joyce did not seem to understand the effect of the clause about monthly rests, or that it meant the addition of about 19 per cent., making the interest, in default of payment, 79 per cent. instead of 60. He stated that such additional interest had never been demanded by him from anyone, and certainly had never been demanded in any account furnished; but still it was in the contract with Smith. A good deal of observation was made during the hearing on the clause, providing for further advances. This was not a clause dealing merely with this particular case. It was part of the printed form. I presume Joyce, from long experience, had found that those coming to borrow on his terms usually found their way back again, and that such a clause would facilitate further transactions. The deed was stamped to carry advances up to £400, and so Joyce informed Smith in a letter of the 21st June. Smith soon after began to negotiate as to the terms on which Joyce would let the money stand out till after his father's death. Joyce declined to comply with this request, but agreed to lend money payable in three years, which, he said, would be less expensive. He further informed him that if the interest were not paid at the end of three years the interest should be added to the principal. Smith immediately applied for a further advance of £260, the highest amount for which the mortgage deed had been stamped, and, after some correspondence, Joyce agreed to advance this sum on the terms of the mortgage, the amount to be secured by a promissory note payable in three years, and by a policy of insurance for £800. The premiums were to be a charge on the property, and were also to carry interest at 60 per cent. The sum was paid to Smith on the 12th July, 1889, and the policy was effected and assigned to Joyce some time after. Smith, as soon as he got the money, went off to the south of Europe to amuse himself. He returned late in August, having evidently spent all he was possessed of, and, in September, he pressed for a further advance of at least £100, with the request that all should be left outstanding till his father's death. He was most urgent in his demand, and was willing to offer any terms. Joyce was absent, and did not return till October. Smith came over to Dublin, and urgently asked for £140. Joyce agreed to advance it on the old terms, with a further policy and a promissory note payable in three years. He refused the request to let it stand out till the father's death. A mortgage was prepared for £140 and £8 costs. The draft of it was shown to Smith. He said he required no further explanation, as it was

Monroe, J.
1894.
KEVANS
v.
JOYCE.

the same as the old one, with which he was familiar, and he declined to have any independent solicitor. On the 15th October Joyce informed him by letter that if he wanted to pay off the money while the bill was running, interest should be paid up to its maturity. Mr. Emerson, the family solicitor, wrote to Smith at this period, and warned him to be cautious, saying that money would soon be forthcoming. The transaction was however completed on the 17th October, 1889. The money (£140) was paid over, and a new policy was executed for £400 and assigned to Joyce. On the 29th October Emerson wrote to Joyce for copies of his deeds of mortgage, saying the amount was to be paid off. Two days later Smith wrote to Joyce, saying his people were anxious to pay. Joyce then informed Emerson that interest should be paid up to the maturity of the bill. Nothing further took place till the 18th November, when Smith wrote for a further loan of £200. Joyce immediately informed Emerson of this request, and stated he would not interfere with Emerson's proposed loan. On the 20th November Smith wrote to Joyce, saying Emerson's negotiations were at an end, and asking for £200. Emerson, however, considered he had yet hopes of getting the money, and asked for Joyce's account, which was furnished to him on the 2nd December, the amount claimed being £1365 2*s.* 10*d.* Nothing came of the loan. I do not know why, as no explanation has been given. Smith was still very pressing for more money. He was, he said, in a deplorable condition, as his family had ceased to speak to him. On the 7th December Joyce advanced him a further sum of £50, taking as security a promissory note for £236 9*s.* 3*d.* This included the original bill of the 18th June, which was about falling due, with interest at 60 per cent. up to date, as well as the £50 just advanced. Joyce declined to lend any more. He also declined to take an annuity payable on the father's death, but suggested that if he (Smith) wished to to sell his equity of redemption, he (Joyce) would probably give as much as anyone else. A good deal of negotiations took place in the months of January, February, and March, 1890, to the terms of which I shall refer presently, relative to the purchase out-and-out of Smith's interest. Joyce said he had lost as much as the whole thing was worth. Emerson, on the other hand, was offering to repay the loan with 5 per cent. interest, and threatening proceedings. Joyce replied he would accept nothing but his bond, and that his motto was "No surrender." He then offered £120 for the purchase of Smith's interest, and, pending the negotiations, he advanced a further sum of £30, at 60 per cent., on the 14th March, 1890.

In the month of March, 1890, Smith was residing in London, and living a very loose and reckless life. He saw in the newspapers an advertisement addressed to "Heirs in distress," and he called on a Mr. Higgins, to whom application was directed to be made. Higgins introduced him to a Mr. Hill, a solicitor, who it appears has since given up the profession, and Hill took his case into consideration. A valuation of the interest of Smith in the property was made, and Hill soon after advised Smith that the transactions of Joyce were unconscionable, and could not stand if challenged in a Court of Equity. Commission was claimed by Higgins for his introduction to Hill; and Hill (not being probably an active practitioner) or Higgins introduced Smith to another firm of solicitors, Messrs. Hicks & Arnold. Money was, of course, necessary, and Messrs. Hicks & Arnold are alleged to have introduced Smith to gentlemen named Isaacs and Edwards, carrying on business as the Union Deposit Bank. Introductions were given—it does not exactly appear by whom—to Messrs. Lewis and a Mr. Bowden, who also advanced money. And, according to the testimony of Smith, these gentlemen who were advancing money to him for his own purposes and to get rid of Joyce, were, in the shape of commissions and other demands, charging interest at rates varying from 60 to 300 per cent. Smith was required to execute mortgages on his property, and he did so. He gave mortgages to Lewis for his advances and interest. He gave a mortgage to Bowden. He gave a mortgage or mortgages to Isaacs and Edwards. He gave a mortgage to Hicks & Arnold to cover costs and to secure Hill's and some other charges, the whole not to exceed £1000. He gave a mortgage to Hill himself for £1000 absolutely, in consideration of the advance of £5 a-week for six months while they were setting aside Joyce's mortgages, and of performing any other services, legal and otherwise, which he was to be under no obligation to render. The

Monroe, J.
1894.
KEVANS
v.
JOYCE.

present demand on foot of these claims, taken together, exceeds £3000. Messrs. Hicks & Arnold forthwith set to work, and retained Mr. Rosenthal as the Irish solicitor. No time was lost, for on the 29th March, 1890, Mr. Rosenthal, on the instructions of Messrs. Hicks & Arnold, but on behalf of Smith, offered Joyce the amount of his advances, with interest at 5 per cent. This was refused, and an action was threatened on the 31st. The writ was duly issued in July, to set aside all deeds and mortgages. Nothing more, however, was heard of the action till the 21st October, 1890, when Smith wrote to Joyce, saying he was going to stop proceedings, and that Emerson was raising the money to pay him.

There was no further correspondence, and no further demand of money, except in December, until the death of Smith's father on the 2nd January, 1891, when Smith's interest became an interest in possession.

The evidence in reference to the sale of the equity of redemption, which was carried out by two contracts and a deed of conveyance, must be stated in its proper place. The action which was commenced in July, 1890, claimed that the mortgages of the 18th June, and 17th October, the assignments of policies of insurance, dated the 4th and 26th October, 1889, and all bills and notes given as security should be declared fraudulent and void.

The present action, which was instituted by the trustee in bankruptcy of Mr. Smith, who was adjudicated bankrupt on the 10th March, 1892, claims also that two agreements of the 31st March, 1891, and a deed of the 3rd April, should be set aside and dieected to stand as security for Joyce's advances, with interest at 5 per cent.

In answer to the action the defendant relies on a great many matters, all of which are deserving of careful consideration. He says, first, that the plaintiff has no right to maintain this suit at all; that he is not a genuine trustee in bankruptcy, fighting the battle of the unsecured creditors; that he is a mere stalking-horse, put forward by secured creditors, who are acting for themselves alone, and in fraud of the bankruptcy laws; that these secured creditors could not have come forward in their own name to set aside the defendant's security; that their only right was to redeem him on payment according to his contract; that the stalking-horse has no better right than those who put him forward, and that the latter have not merely no rights, but are guilty of maintenance in seeking to prosecute this claim. These contentions are mainly based on facts which were elicited on the plaintiff's cross-examination. It then appeared that Smith was adjudicated on the petition of Higgins, a secured creditor; that proofs of debt had been filed by four persons only—by Hill, who was admitted to vote for £963; by Higgins, who was admitted to vote for £105 19*s.*; by Lewis, who was admitted to vote for £93 19*s.* 9*d.* (having valued his security at £150); and by Emerson, who was not admitted to vote at all. It further appeared that the committee of inspection consisted of Hill, Higgins, and Hogan acting for another of these creditors; that Mr. Kevans had been asked by Mr. Rosenthal to act as trustee; that he had consented to act without inquiring as to the existence of any unsecured creditors; that he had personally advanced no money; that he knew of no assets likely to be realised, save what might be recovered by setting aside Joyce's securities, and that he had got security against Joyce's costs in the action from five of Smith's secured creditors, by a document of the 15th December, 1892, referring to another document signed by the guarantors on the 11th March, 1892. This was an instrument of a somewhat peculiar character. It is marked on the back as a "Proposed Memorandum of Arrangement between Incumbrancers." It is headed "*Re* H. W. Smith," and then proceeds: "We, the undersigned, agree to combine for the purpose of mutually proceeding to recover the respective amounts mentioned in the schedule hereto due to us, upon the following terms." The schedule gives the amount due to each creditor for principal and interest, and the date of the mortgage by which each claim was secured; and the agreement provides that if there should be a deficiency of assets to pay all, the contractors should be paid according to their priorities. It provides, further, for the rate of interest which should be paid on the debts due. It provides that the parties to the contract should pay rateably a certain sum to Mr. Rosenthal, who should receive his full costs in case of his being successful against Joyce. It provides, further, for the payment rateably of a certain sum to Hill & Co. for the costs of having Smith adjudicated bankrupt, and that Higgins should act as petitioning creditor, with remuneration; and it provides, lastly, that any moneys to be derived from the proposed proceedings against Joyce, after the payment of all costs in full and the return of the contributions, should be shared according to the priorities mentioned in the schedule; that, as between themselves, the parties should only be entitled to 10 per cent. interest in the first place, but that if there turned out to be more than enough to pay principal and 10 per cent., the balance should be distributed among them, so as to pay up the amount of interest secured by the several mortgages. This document was signed by Hill, Lewis, Higgins, and Bowden. The plaintiff swore, and I believe him, that he never saw this agreement, and had no knowledge of its existence. He says: "I was asked to be a trustee. I depended on Mr. Rosenthal to keep me straight; but I was determined to do my duty as trustee when the rights of all parties should be ascertained." I acquit Mr. Kevans entirely of any intention to act wrongly; but I cannot acquit him of negligence in failing to inquire into the circumstances of this adjudication, and the events which followed it, before he consented to act as trustee at all. In my opinion this agreement of March, 1892, was a distinct fraud on the bankruptcy law, and it was referred to in his own letter of guarantee. The proceedings in bankruptcy were nominally in the interest of the unsecured creditors; and yet there was a secret agreement among the secured creditors, whereby not one shilling could ever reach any person but themselves.

But however justifiable might be the observations of counsel on those transactions, I did not, and do not, consider the facts disclosed could be a bar to this action. There might have been grounds for making an application to the Bankruptcy Court, as in *Ex parte Cooper* (1), to remove the trustee or to stay the action. But I have now before me a properly constituted suit, with a plaintiff acting as trustee, intending, under the supervision of the Board of Trade and the Bankruptcy Court, to do his duty to all creditors, however difficult it might be with the present committee of inspection. Neither do I see that the plaintiff can be held to be guilty of maintenance. He is the representative of the bankrupt, and he has all the bankrupt's rights.

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(1) L. R. 10 Ch. App. 510.

The defendant contends, in the second place, that the plaintiff has no right to recover, because the plaintiff deliberately abstained from offering, in his statement of claim, to redeem the property by payment of the defendant's claim, with interest at 5 per cent. I do not think it was owing to any mere slip of pleading that this offer was omitted; because there was a deliberate departure from the form of the statement of claim in the bankrupt's own action, in which such an offer was made, and because counsel for the plaintiff argued at length that no such offer was necessary where the plaintiff was a trustee, and where there was a pending action for sale in this Court. The plaintiff, moreover, when cross-examined, stated that he had no intention to redeem, because he had no money to do so. When pressed, after this evidence, as to what course the plaintiff intended to pursue, the counsel, after a hurried conference, asked leave to amend the statement of claim by offering to redeem at such time as the Court should think right. I allowed the amendment to be made against the defendant's strong protest, and I did so because on three separate occasions the defendant had been offered his advances with interest at 5 per cent., and his answer had always been a refusal, with a statement that his motto was "No surrender." To dismiss the action, or to refuse an amendment, would have been, in my opinion, too severe a penalty for such an omission, especially as the decree must have contained a direction to pay within a limited time, and an order dismissing the action if the direction was not complied with. These preliminary objections fail, and the case must therefore be considered on its merits.

Dealing with the case on the merits, the plaintiff alleges and submits that the contracts by way of mortgage related to a reversionary interest only, and were in their terms hard and unconscionable; that Joyce was a mortgagee, and did not deal with his mortgagor on equal terms; that the sale of the equity of redemption was at an undervalue, made without advice, and unreasonable; and that therefore all the deeds and contracts should be set aside. The defendant alleges that the mortgages were fair and reasonable; that the purchase of the equity of redemption was a purchase of an interest in possession; that there is no evidence of fraud; that Smith knew well what he was doing; that he bargained with the defendant on equal terms; that Smith was professionally advised; and that the defendant gave as much or more than the property was worth.

Two things must be dealt with separately—the mortgages and the sale of the equity of redemption. They differ in the time and circumstances under which they were respectively executed, and different equities may have to be applied to them. Taking the mortgages and assignment of policies first, I find, as matters of fact, in reference to all—(1) that Smith came to Joyce, and not Joyce to Smith; (2) that Smith, a young man beyond the average of intelligence, understood the nature and material parts of the contracts into which he was entering, with the exception of the provision as to monthly rests; (3) that Smith was not advised by any independent solicitor, but this was his own fault: he was offered and refused to have any such advice; (4) that Smith was not suffering from any pecuniary pressure beyond this, that he was reckless and improvident, and ready to accept money on any terms from anyone who would supply the means of pursuing the evil career on which he had entered; (5) that the property comprised in the mortgages of June and October, 1889, with the policies of insurance effected on his life, were ample security for the moneys advanced.

What is the law in reference to a state of facts like this? The rules of equity on this subject have been so recently and so fully explained in the case where Mr. Joyce was himself the defendant (*Rae* v. *Joyce* (1)), that it is only necessary to refer to them very briefly. Where a person is dealing with another who is a mere reversioner, the burden is cast upon the creditor of showing that the bargain is not hard or unconscionable. Many considerations may enter into the proper solution of this question: the intelligence of the debtor, the explanations which may have been given, the independent advice which he has obtained, the pressure put upon him by want of money; but still, after all, the answer must be given to the question, Was there a hard and unconscionable

(1) 29 L. R. Ir. 500.

bargain? The mortgages in this case were, as I have said, on ample security. Interest was charged at the rate of 60 per cent., or in certain events the further interest was to be 79 per cent. A sum was inserted in each mortgage deed for costs, and interest was charged on this also at 60 per cent. Policies of insurance were to be effected, and the premiums were to be paid, by the borrower, and charged on the lands. These premiums, if paid by the lender, were also to carry interest at 60 per cent. The money was lent (in all cases save £140 for six months) on bills running for three years, and the obligation was thrown on the borrower to pay interest at 60 per cent. up to the date of the maturity of the bill, though he might be in a position long before that to pay up debt and interest to date of redemption. A power was also given to the mortgagee, on the happening of any default in payment of principal or interest, to sell out the security by public or private sale. Is this a reasonable bargain to make? or is it, in the language of the cases, "hard and unconscionable"? In my opinion it is both; and no such contract could be allowed to stand for one moment in a Court of Equity. It is well that such should be known to be the law. The usury laws are abolished, no doubt; but Courts of Equity have not lost their power of dealing with contracts such as this, where the parties are not dealing and cannot deal on equal terms. The present case is an excellent illustration of the value of that doctrine. Had it been known, and had it exercised the deterrent effect which it ought, Henry Walter Smith, a sergeant of Hussars, and of good family, might now be in the enjoyment of a nice property and fairly ample means, instead of being an outcast from his family, bankrupt in character as well as fortune.

The two mortgages, the deeds of assignment of the policies, and all bills of exchange, given in respect of the sums so secured, should, if there were nothing more, stand as securities only for the moneys actually advanced by Joyce, with interest at 5 per cent., and on payment thereof should be given up to the plaintiff. But a great deal more happened, and the subsequent events have now to be considered.

Up to the month of December, 1889, Joyce had advanced to Smith the sum of £540 in cash, and on the 2nd of that month

Joyce wrote a letter to Emerson, claiming a sum of £1365 2*s.* 10*d.* to be due to him for principal and interest. Smith wanted more money. Joyce refused to lend him any more, or to take an annuity payable on his father's death. He tells him early in December it will be best to sell his reversion, but he advises him not to do so till he can use the money well. This is, I think, the first mention of the sale of the reversion in the correspondence. But notwithstanding his refusal, he did at last consent to advance a sum of £50, payable in three years. While arranging the terms of this further loan Joyce wrote, on the 5th December, 1889:— "But if, in future, you deem it wise to dispose totally of your interest, I will go into a calculation, and see what we would feel disposed to give. You can easily take it, if we are the best buyers you can get." Smith wrote the following day to know what he would give, and informed him his father's life was very precarious. I find no immediate answer to this; but on the 16th January, 1890, Smith wrote to Joyce, asking for a further advance, and saying the property was about being sold. Joyce immediately declined to advance more; but he said he could get a friend who might risk a small sum in the purchase of the reversion. He said the amount due to him on the maturity of the notes would be £2000, and that the reversion was not worth it. Smith asked what the small sum would be, and was told it might be one or two hundred, and ultimately Joyce wrote, on the 26th January, that he could get a friend to purchase it at £150. Nothing came of this, as Emerson was offering then to pay off at 5 per cent., an offer which was refused. In March following Smith applied for £120 on a three months' bill, saying he knew that he owed about £1500 up to that date. Joyce replied, he owed £2000, that his reversion was worthless, especially as another mortgage for £150 on it had been executed; but still he would give £150 for everything, or he would lend him £30 at the usual rate. Smith said he wanted £120, and Joyce replied, on the 11th March, 1890, that he would not lend: he would buy. Smith asked him to increase the purchase-money to £300, and he then declined to give more than £200. No terms of purchase were arrived at. Smith got the loan of £30 on the 14th March, and as he could get no more he went off to London, where he borrowed large sums from the London money-lenders at what he calls usurious interest. In June and July, 1890, Joyce wrote pressingly for payment of the £30 bill, then overdue; but it was not paid. Nothing more is heard of Smith till October. He was all the time in London, borrowing money wherever he could, and living generally a disreputable life. In October he wrote to Joyce, telling him his life estate was worth £3000, and asking would he buy; but Joyce refused. More money was then raised in London, and was spent like the rest. In December he came over, and tried to borrow £100, and failed. His father died on the 2nd January, 1891. He returned to London, where he borrowed more money, and did not return to Dublin till the month of March. In March he came back again, and called on Joyce. He said he had been borrowing money in London, but did not say how much. He said he wanted to sell out and go away, and asked Joyce how much he would give. He wanted £400. Joyce said he would give £370. He said it should be in the form of a loan of £250 at 60 per cent., and purchase-money of £120. He gave no explanation of this; but he said that Rosenthal should be dismissed, and the action discontinued. This was agreed to, and Smith wrote out a proposal in the following form:—"I propose to sell to you absolutely my equity of redemption in the property, money, and interest mortgaged to you, for the sum of £370; or further, to advance additional £250 on my deeds to you, and then I sell you a further sum of £120 for all equity of redemption, including interest and rent now due." This proposal is not very intelligible in its form, but it was followed by two more technical documents, which were duly signed by both parties. The first was in this form:—"I propose to borrow from you a further sum of £250, payable on the 13th July, 1892, on the security of my deeds of mortgage to you of the 18th June, and 17th October, 1889, which deeds of mortgage I confirm in every respect. In consideration of your making me this further advance, I agree and undertake to change my solicitor and have the action in the Chancery Division now pending against you discontinued. I also ask you to agree to extend the time for payment of my promissory note for £30, now overdue, till the 16th July, 1892; and for the considerations aforesaid I hereby appoint you mortgagee in possession." Joyce then accepts this proposal, to extend the time for paying the promissory note, and to make the further advance of £250, on notice of discontinuance being served. The second agreement or proposal was in this form, after certain recitals:—"I hereby propose to convey to you, Thomas Joyce, all my interest and equity of redemption in the lands and moneys mentioned, and I undertake to execute to you immediately, or such person as you may direct, a proper legal conveyance. The consideration to be paid by you to me for such assignment is the sum of £120, which sum, together with the sum of £2326 4*s.* 4*d.*, which will be the total of the sums due on my two mortgages to you when same fall due, together with a further sum of about £73 paid for premiums, shall constitute the purchase price, but without any merger of said securities." This proposal was also accepted by Mr. Joyce.

When the two proposals were completed, Joyce said they should be approved of by an independent solicitor. He proposed Mr. Rosenthal, but Smith refused to have him, as he was really solicitor for Hill. Joyce then proposed Emerson, who was also rejected, as he was likely to demand some of the money for himself. Joyce then said he must have some one, and took down the Directory, from which six names of solicitors were selected. I do not know who the others were, but at the head of the list were Mr. Cornelius Walsh and Mr. Jones. The former was selected, Mr. Joyce saying he was always expeditious in carrying out any work entrusted to him, though he had never acted for Joyce himself. Smith then wrote on a piece of paper, addressed to Walsh, these words—"Act for me, and carry out the enclosed agreements at once, as I wish to leave Dublin to-morrow evening. I give you an order on Mr. Joyce for payment of costs of doing so, not to exceed £5."

Smith went off to look for Walsh, but could not find him. Joyce then enclosed in an envelope the two agreements of the 31st March, the two mortgages, the two agreements for assigning policies of insurance, and the statement of claim. He went to look for Walsh and found him, and asked him to look after the matter in Smith's interest. Walsh read what papers were sent him, and subsequently saw Smith. He told Smith that he thought Joyce was acting wrongfully, that he (Smith) was acting foolishly, that he was parting at once with all he possessed; that he (Walsh) must see Rosenthal; that the matter was not one he could recommend, and that possibly he (Smith) could get more or derive some benefit from the pending action. Smith refused to take his advice. He would not see Rosenthal, or let Walsh do so. He said Rosenthal's costs were all right, as he had Hill to look to, and whether he (Smith) won his action against Joyce or lost it, he would have no benefit, as he was robbed and destroyed by the London money-lenders. Walsh then undertook to prepare the deed of conveyance, which was executed on the 3rd April. He entered a rule to change Rosenthal as solicitor, and served notice to discontinue the action. The money (£375) was paid by Joyce, and £5 were deducted for costs.

Under all these circumstances surrounding the preparation and execution of the agreements of the 31st March, and the deed of the 3rd April, 1891, the first question to be answered is this— Were those men acting on an equal footing? and was this vendor of his equity of redemption properly protected by an independent solicitor? I am quite satisfied that in March, 1891, Smith had not the smallest idea of the amount of charges on his property. He could not explain it to Joyce. He knew he had got considerable sums of money and spent them. He knew that large sums had been deducted for interest and commission before any amount of the principal reached his hands; he knew he had given mortgages for sums far exceeding what had really been paid to him. That he had no definite idea as to what he had got or what he had secured is manifest from this, that at a subsequent period he made an affidavit for Mr. Joyce, stating he had given security to the extent of £8000 or £9000, and that he had been charged interest varying from 60 to 300 per cent. His own idea was this, that he was ruined, that nothing could come out of his property; and he was quite prepared to grasp at ready money, no matter how little, to gratify his immediate desires or to get him out of the country. It is further manifest that at this time he was in a deplorable condition as regards money. He had gone to Joyce on many occasions, and Joyce was now determined to lend no more. He had spent all the money raised in London, and no further supplies could be had in that quarter. He was reduced to the last extremities, having severed his relations with his own family. He owed Joyce money, and, though the larger portion would not be due for another year, there was one bill overdue, for which Joyce had been pressing him more than once. Joyce was his mortgagee, and as was said by Lord Redesdale, in *Webb* v. *Rorke* (1), the Courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. *Hickes* v. *Cooke* (2) and *Ford* v. *Olden* (3) are to the same effect.

This question of the equality of position between the vendor and vendee of an equity of redemption, where the mortgagee is the purchaser, is largely affected by the position of the vendor in the matter of independent and useful advice. Smith, as part of his bargain, had dismissed his own solicitor. He had the advice of Mr. Walsh, no doubt; but when did he get it? and of what value could it be? Walsh was never called in till the contracts were completed. His instructions were not to advise on the propriety of those agreements, but to carry them out in twenty-four hours. What material had he to give advice that would be worth a farthing? He had not an idea of the value of the property. He was not informed as to Smith's age, or his mother's age. He knew nothing of the value of the life estate. He knew nothing as to what charges were upon it. I do not regard this as the proper advice which an independent solicitor is called upon to give. He should remember that a client is coming to him for useful advice in a critical position. He should see what is to be sold. He should see what price is offered. If there be questions of law on which he feels himself incompetent to advise, he should get that advice. If there be questions of valuation on which he may not be fully informed, it is his duty to get proper assistance. If he learns that large sums have been lent by London money-lenders at usurious interest to the owner of a reversionary interest, it is his duty to tell the client that these transactions are as liable to be investigated as those which Joyce was then seeking to have confirmed. Should his client tell him to make no investigation, and he makes none, he cannot be looked on as a person whose independent advice is to give validity to a transaction otherwise doubtful. Mr. Walsh gave no advice in this case which could have affected his client's mind in the least, for the simple reason that he had no real advice to give, and no means of forming a judgment. For all these reasons I am of opinion that during the period which elapsed from the 31st March till the 3rd April, 1891, Joyce and Smith were not on an equal footing, and therefore the *onus* is thrown on Joyce of showing that the bargain which was made was fair and reasonable, and that the property was not sacrificed by being sold at an undervalue.

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(1) 2 Sch. & Lef. 661. (2) 4 Dow, 16. (3) L. R. 3 Eq. 461.

Then comes the question, Has the defendant discharged the obligation cast upon him, by showing that the purchase-money for the equity of redemption was fair and reasonable? The rental of the land in 1891 was £572 per annum; but as two of the tenants had not had judicial rents, a purchaser might reasonably consider that such a reduction as has since taken place might not be unlikely to occur, and the rental which should be adopted as the basis of calculation should be therefore the present one of £525. This is subject to a headrent of £150, and a tithe rent-charge of £25, leaving a net rental of £350. The interest on the mortgages sold is £150, and the dividends on the stock is £8. The fee is subject to a charge of £1000 and to the annuity of the owner's mother, and the life estate is subject to a mortgage of £150, effected in the month of January, 1890. The owner's life estate in this property, and subject to these deductions, has been variously calculated by tables and otherwise, and some calculations were made of the owner's reversionary interest while his father was still alive. Mr. Todd, an actuary, calculated the reversion to be worth £1719 in May, 1890; and, on the 19th January, 1891, he assumed a rental of £500, and estimated the owner's life estate at £3700. He did this for the English money-lenders, and had no object in putting too high an estimate on it.

Mr. Joyce and a Mr. Harding, on the other hand, say the owner's life estate is not worth more than about £330. They work it out in this way: they suppose a sale through the Land Commission at seventeen years' purchase, the redemption of headrent and the tithe rentcharge at twenty-two and a-half years' purchase, the payment of costs of sale, and the investment of the balance of the purchase-money at 2¾ per cent. The result of all this is a net annual income of about £27 out of the entire property, land and mortgages, which they calculated at twelve years' purchase, that is, about £330, which is to be subject to all the advances of Joyce and the London money-lenders. I confess I have no great faith in these valuations, seeing that Joyce himself, on three several occasions, refused to be redeemed for his advances and £5 per cent. interest, which would amount to about £700, and that the English money-lenders advanced fully £1000 more, which must be puisne to Joyce's claim.

It is to be observed that in Joyce's valuation he allows nothing for Smith's reversionary interest in the mother's annuity of £200, to the value of which I find no proper guidance from Mr. Engelbach, as he was supplied with erroneous figures. To my mind the most satisfactory calculation is that of Mr. Nahmer, furnished after the arguments concluded. He makes allowance for the precarious value of the landed security by allowing a 6 per cent. interest, and he also allows for insurances at 1 per cent. higher than the ordinary rate. Calculated at the ordinary rate of premium, his valuation of the life estate is £2886 11*s.* 5*d.*, but with an extra premium of 1 per cent. his valuation is £2230. I have endeavoured to work out the problem in various ways, and I consider the fair value of this estate on the 31st March, 1891, to have been £2200—certainly not to have been less than £2000.

I have already decided that the mortgages of the 18th June, and the 17th October, 1889, could, if there was nothing more, stand good only as securities for the sums advanced, and £5 per cent. interest. This, on the 31st March, would have amounted to £700, and the additional purchase-money of £375 would have brought the whole expenditure of Joyce to £1075. The property was, no doubt, also subject to the London mortgages, and even if the claims had been cut down to the amount admitted by Smith to have been advanced in cash, with 5 per cent. interest, the equity of redemption subject to these mortgages would have been worth little or nothing. This was the way Mr. Atkinson opened the case for the defendant, when there was no prayer to set aside the agreements of March, 1891; and Mr. Kenny, in summing up for him, spoke of his purchase being one subject to the London mortgages and to possibly six or seven Chancery suits to reduce their claims. They both asked triumphantly, what was there to buy, as Smith's equity of redemption had been long ago absorbed by Joyce, even at 5 per cent. interest, and the London money-lenders' claims? I confess if this had been the true view of the case, a Court of Equity, considering the nature of the property, would have had great difficulty in holding Joyce's purchase so unreasonable that it must be set aside. But this is not the true view of the case. While Joyce offered £370 for the equity of redemption, he stipulated that his old mortgages should be confirmed, and that he should be at liberty to set up again his claim for 60 or 79 per cent., and thus sweep away the entire estate for himself. The purchase of the equity of redemption was therefore a mere device to set up the mortgages which he must have known could not stand against the owner of a reversion. It is contended, however, that Smith could not possibly derive any personal benefit from setting aside Joyce's mortgage, inasmuch as the London creditors were ready to seize upon everything which he left. If this argument were tenable, no assignee could ever set aside a usurious transaction; and I consider that Smith would derive advantage by having his property applied, not in giving to one creditor more than he was entitled to in equity, but in discharging his obligations to other creditors, and enabling him to free himself from the weight of debt, and possibly to get his certificate of conformity. I am of opinion that Mr. Joyce has not satisfied the duty cast upon him of showing that his bargain was fair and reasonable, when, by the expenditure of £1075, he had succeeded in getting hold of a property worth considerably more than £2000.

I must therefore declare that the deeds of the 18th June, and 17th October, 1889, the deeds of the 4th and 26th October, 1889, the two agreements of the 31st March, 1891, the deed of the 3rd April, 1891, and all bills or promissory notes given as security for the moneys mentioned in said deeds or any of them are fraudulent and void, and must stand as security only for the cash advances made by the defendant to or for the said Henry Walter

Smith, with interest at 5 per cent. from the date of the several advances.

It must be referred to the Examiner to take an account of what is due to the defendant in respect of such advances, with interest thereon as aforesaid.

There must be a direction that within one calendar month from the service on the plaintiff of the order confirming the Examiner's certificate he do pay the amount thereby found due, and in the event of such amount not being paid as directed, that the plaintiff's bill do stand dismissed, with costs.

That on payment of the amount found to be owing being duly made, the defendant do hand over to the plaintiff all the aforesaid deeds, agreements, notes, and bills so declared to be fraudulent and void.

It only remains to deal with the question of costs. The rule is not uniform, though, where there is nothing special, the costs usually follow the event, as in *Beynon* v. *Cook* (1) and *Nevill* v. *Snelling* (2), especially where the plaintiff has always been ready and willing, and has by his statement of claim offered, to pay the defendant's advances, with 5 per cent. interest. But various cases have arisen where a different order has been made. In *Bromley* v. *Smith* (3) relief was given to the plaintiff, but no costs. In *The Earl of Aylesford* v. *Morris* (4) relief was given to the plaintiff without costs, though the defendant before action had been offered his advances with 15 per cent., and in this respect the decision of Wickens, V.-C., was affirmed by Lord Chancellor Selborne and Lord Justice Mellish. In *Fry* v. *Lane* (5) Mr. Justice Kay refused to give costs to a successful plaintiff merely because moral fraud had been charged and not proved. In *Rae* v. *Joyce* (6) the Vice-Chancellor of Ireland refused costs to the plaintiff, while he decided in her favour, because he did not believe a considerable part of her evidence given at the trial. Thus, the matter is left very much at large. I cannot in the present case fail to remember that the plaintiff, although before action Smith had offered to pay, denied up to the very last moment all liability to give any undertaking in the action, that, as a condition of relief to the plaintiff, the defendant should be paid his advances, with 5 per cent. interest, and asserted that he could give no such undertaking, because he had no money. In this case, as in *Fry* v. *Lane* (1), there are charges amounting to moral fraud on the part of the defendant which I do not find to be sustained. And again I have this fact, that the plaintiff has paid and is paying no costs himself, that the costs have been paid by a syndicate of secured creditors, who, while putting forward one of themselves to obtain an adjudication in bankruptcy against their debtor, and instructing their trustee to bring an action nominally on behalf of unsecured creditors, have entered into a secret agreement whereby the unsecured creditors are to get nothing, but all moneys recovered are to be diverted into the pockets of the syndicate themselves, in discharge of principal and interest alleged to be more usurious than that claimed by the defendant in this action. Justice, in my opinion, will be most satisfactorily done by getting rid of the defendant's contracts as unfair and unreasonable, by giving him his outlay, with 5 per cent. interest, and by leaving each party to abide his own costs of the action.

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(1) L. R. 10 Ch. App. 389.

(2) 15 Ch. Div. 679.

(3) 26 Beav. 644.

(4) L. R. 8 Ch. App 484.

(5) 40 Ch. Div. 324.

(6) 29 L. R. Ir. 500.

W. G.

Appeal.
1895.
May 3, 4, 6, 6, 7, 10.
June 25.

The defendant appealed (2).

The Right Hon. John Atkinson, Q.C., *Kenny, Q.C.* (with them *Ronan, Q.C.*, *Wylie, Q.C.*, and *Godley*), for the appellant:—

The adjudication in bankruptcy, if obtained by fraud or misrepresentation, is not binding upon this Court, or upon the defendant, who was a stranger to the bankruptcy proceedings in England: *Reg.* v. *Saddlers' Company* (3), see judgment of Willes, J. (p. 431), citing *Lord Bandon* v. *Becher* (4) and *Sheddon* v. *Sheddon* (5). So it has been held in the case of a winding-up order : *In re Bowling and Welby's Contract* (1). As to the illegality of these proceedings on the ground of champerty : *Littledale* v. *Thompson* (2) ; *James* v. *Kerr* (3), which closely resembles the present case ; *Hilton* v. *Woods* (4) ; *Hutley* v. *Hutley* (5) ; *Re the Attorneys' and Solicitors' Act,* 1870 (6) ; *In re the Paris Skating Rink Co.* (7).

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(1) 40 Ch. D. 324.

(2) In the Court of Appeal, before Walker, C., and FitzGibbon and Barry, L.JJ.

(3) 10 H. L. Cas. 404.

(4) 3 Cl. & Fin. 479.

(5) 1 M'Queen, 535.

The original statement of claim is bad in law, and under the old procedure would have been demurrable, because it does not contain an offer to redeem : *Harding* v. *Pingey* (8) ; *Hughes* v. *Cook* (9).

As to the merits of the case, Smith got all that the property was really worth. He knew all about the property, and was well able to protect himself. In this respect the case is quite different from *Rae* v. *Joyce* (10). He was invited to take professional advice, and refused to do so. As to the purchase of reversionary property: *Fry* v. *Lane* (11), where all the cases are collected. Where the parties are on an equal footing, mere inadequacy of price is no ground for setting aside a purchase. By the deed of 3rd April, 1891, Smith confirmed the prior transactions : *Jarratt* v. *Aldam* (12). *Ford* v. *Olden* (13), on which Monroe, J., relied, was the case of pressure being used by a mortgagee who took advantage of the mortgagor's distress. At most, it is an authority that the Court will look with some jealousy at the purchase by a mortgagee of the equity of redemption ; but there is nothing to prohibit such a transaction if it be a *bona fide* one between the parties.

Houston, Q.C. (with him *Serjeant Dodd* and *Jefferson*), for the respondent :—

As to the omission of an offer to redeem in the pleadings, if the respondent was successful there would be more than sufficient

(1) [1895] 1 Ch. 663.
(2) 4 L. R. Ir. 43.
(3) 40 Ch. D. 449.
(4) L. R. 4 Eq. 432.
(5) L. R. 8 Q. B. 112.
(6) 1 Ch. D. 573.
(7) 5 Ch. D. 959.
(8) 10 Jur. (N. S.) 872.
(9) 34 Beav. 407.
(10) 29 L. R. Ir. 500.
(11) 40 Ch. D. 312.
(12) L. R. 9 Eq. 463.
(13) L. R. 3 Eq. 461.

Appeal.
1895.
KEVANS
v.
JOYCE.

to provide for the appellant's demand, subject to the control of the Land Judge, and an offer to redeem was a mere formality. The error, if any, in pleading has been amended.

There is no case of champerty here within any of the definitions in *James* v. *Kerr* (1). The English creditors were merely organizing a united effort to protect their own rights.

The adjudication in bankruptcy was perfectly valid. The act of bankruptcy consisted in Smith leaving the country for the purpose of defeating and delaying his creditors. The intention will be inferred from the necessary consequence of the act: *Ramsbottom* v. *Lewis* (2).

The original mortgages and the subsequent transactions prior to the 31st March, 1891, were hard and unconscionable bargains, and must be set aside: *Rae* v. *Joyce* (3); *Benyon* v. *Fitch* (4); *Miller* v. *Cook* (5); *Aylesford* v. *Morris* (6); *Gwynne* v. *Heaton* (7); *Tyler* v. *Yates* (8). The original transactions were bad upon two points, first, the exorbitant rate of interest charged for a loan on good security, rendered still more usurious by the contract that the loan was not to be paid off for three years; secondly, the want of the advice of an independent solicitor: *Evans* v. *Llewellyn* (9); *Baker* v. *Monk* (10).

The subsequent document of the 31st March, 1891, purporting to confirm voidable transactions without Smith being advised as to his true position and rights respecting them, was voidable: *Wiseman* v. *Beake* (11); *Crowe* v. *Ballard* (12); *Cole* v. *Gibbons* (13).

This is the case of a mortgagee purchasing the equity of redemption from the mortgagor: *Webb* v. *Rorke* (14); *Ford* v. *Olden* (15); and at a time when the whole evidence in the case shows that the mortgagor was in pecuniary distress, and a person of reckless disposition; and it is also the case of the acquisition, even in 1891 at an undervalue, of reversionary property, for the jointure was a blister on the property, which, even at that time, rendered it of a reversionary character.

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(1) 40 Ch. D. 449.
(2) 1 Camp. 279.
(3) 29 L. R. Ir. 500.
(4) 35 Beav. 570.
(5) L. R. 10 Eq. 646.
(6) L. R. 8 Ch. App. 484.
(7) 1 Br. C. C. 1.
(8) L. R. 11 Eq. 264.
(9) 1 Cox Ch. Cas. 340.
(10) 10 Jur. (N. S.) 624, 691.
(11) 2 Vern. 121.
(12) 1 Ves. Jun. 215.
(13) 3 Peere Wms. 290.
(14) 2 Sch. & Lef. 661.
(15) L. R. 3 Eq. 461.

June 25.

WALKER, C. :—

In this action two sets of transactions have been impeached. The first, the loan transactions of 1889, and the second, the transactions of March and April, 1891. During the first, Smith was a reversioner; but his father died in January, 1891, and his estate, so far as it was left to him, became then an estate in possession.

I think the first material question is, whether, on the 31st March, 1891, the prior loan transactions of 1889 were impeachable by Smith. We have ample materials for judging of the character of Henry Walter Smith in 1888, when he first approached Joyce. He was a man apparently of respectable origin and of some education, but self-indulgent and reckless in the extreme, ever ready to sacrifice his future for present enjoyment, separated from his family on account of his conduct. Twice within the short period, over which the events range, he turns up as a private soldier, and ends as an exile in Africa, from which he is ready to sell himself to the highest bidder on his evidence. In fact, he seems the typical expectant heir whom Courts of Equity protect against himself.

In November, 1888, his position as regards property was this: he was entitled in reversion, expectant on his father's death, to an estate for his life in the lands of Summerhill, and in a £3000 mortgage, and £200 Great Southern and Western Railway stock. He saw one of Joyce's advertisements, offering to lend on reversionary interests, and he wrote on the 27th November, 1888, asking for an advance of £170. Joyce enclosed a prospectus, stating terms 60 per cent. Smith described the loan as one of a very temporary nature—one, therefore, in which the title to be made should be less, and the interest on the loan lighter. Joyce, on the 30th November, 1888, declined dispensing with the investigation, adding, "If you can get it at £5 per cent. you should take it, and if you can avoid interest at 60 per cent. by waiting, you should do so." Nothing more was done that year. In 1889 Smith left the army, and came to Dublin in June, 1889. He had no employment, and was dependent on his father. He called on Joyce; he was not deeply in debt, but wanted money for extravagances and dissipation, and for the loan he got he had really ample security to offer. After some negotiation £140 was settled on, and Joyce had some investigation made into the title, but of a superficial kind. On the 17th June the matter was settled; but subsequently, on the 18th, Joyce asked him would he have a solicitor to act for him. Emerson, the family solicitor, was suggested. Smith declined: he seemed to think private advice would stop the loan, and he signed a document declining such advice. Joyce had a solicitor on the premises, paid by salary, Mr. M'Minn. I have already, in *Rae* v. *Joyce* (1), observed upon the position of such a person. M'Minn handed Smith a print of the form of mortgage used by Joyce. Smith read it, or had the opportunity of reading it. He certainly knew he was to pay £60 per cent., and was giving a promissory note for £140 2*s*., payable in six months. By this mortgage of the 18th June, 1889, reciting the giving of the note, he conveyed to the mortgagee his interest in reversion to secure £140, and £5, stated to be agreed upon as the costs of making searches, and preparing, stamping, and registering the deed, with interest at £60 per cent. The proviso for redemption was upon payment of these sums at the maturity of the note, with interest at £60 per cent., and all other sums which should become due for advances, including interest with monthly rests, commission, and other customary charges. There was a power of sale exercisable without notice, and the mortgagor covenanted to pay the £140 2*s*. and £5 on the 21st December, with interest, and also any further interest and all further advances. Smith was paid his £140: he asked what he had to pay for costs, and he was told, nothing. I do not think that he knew he was to pay £60 per cent. on this £5, and he certainly did not know he was liable under the contract to monthly rests; and Joyce himself never acted on this stipulation, though he had the right to enforce it, and, I think, must be affected by all the considerations which apply to a deed stipulating for such a right. On the 20th June Smith applied to Joyce by letter, to know what he would charge to let the £140 remain out till he came in for the property, and asked him to delay lodging the deed in the Deeds Office till the other affair was finished. Mr. Joyce replied that the deed had been registered, and he offered an advance under the deed, which, he told him, had been stamped up to £400, and offered to make the rate one for two or three years. There was some correspondence as to the title, in which Smith obtained from Emerson a letter, stating the effect of the settlement under which he derived, and it was agreed an advance should be made of £260, and a note given, payable in three years, and a policy effected. This was carried out by a note of the 12th July, payable in 1892, and a policy was effected and assigned to Joyce some time subsequently. This made an advance of £400. Smith then went on a tour of pleasure to the Mediterranean. The assignment of the policy was sent after him to Egypt, and, as he alleged, was lost; and it appears it was not executed till October. The premium was £19 4*s*., and interest at £60 per cent. was made payable upon it. On the 11th December, 1889, the premium was increased by an annual sum of £8, and leave was given to Smith to follow the military profession in any part of the world.

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(1) 29 L. R. Ir. 500.

Smith next, on the 23rd August, wrote to know if Joyce would take a stipulated sum for the £400, payable on the death of his father; and he asked for another advance of £100, alleging he was very hard up, and would do anything in reason. Mr. Joyce was on vacation, and the negotiation was delayed. On the 15th October, 1889, Smith was in Dublin. It is evident he was trying to raise money through Emerson, and he wrote to ascertain what sum Joyce would be "inclined to take to-morrow to pay off the £420 or £424, whichever it is? 2nd, will you, in any case, be prepared to advance £150, if I do want it?" Joyce replied:—"Replying to your letter just now received, if you desire to pay off the £424 16*s*. advanced, you should pay all interest up to date the notes fall due. This is our rule; we never disturb a transaction once done. To your second query, as regards a further advance, all depends on the security." Joyce ultimately agreed to advance £140 4*s*., repayable in three years, and the transaction was carried out by a mortgage, dated 17th October, 1889. Smith himself approved of the draft, and endorsed on it that he did not

Appeal.
1895.
Kevans
v.
Joyce.
Walker, C.

require approval by a solicitor on his behalf. On that day Emerson wrote to him, sending copy of a re-settlement required by Joyce, and stating: "You should act prudently, as we may be able to get the loan, and have sent particulars of security to a party likely to buy." The mortgage was in the same form as that of June, save that it was repayable in three years, and was accompanied by a promissory note, and the costs were measured at £8, on which also interest was charged. A further policy for £400 was also effected on the 23rd October, and assigned to Joyce. The annual premium was £10 14*s*., and it appears that, on the 11th December, 1889, this premium was increased by an annual sum of £4, and leave was given to Smith to follow the military profession in any part of the world. Interest at £60 per cent. was made chargeable on premiums paid by Joyce. It would appear this assignment of the policy was not executed till the middle of November.

On the 29th October, 1889, Messrs. Dudgeon & Emerson wrote to Joyce for copies of the two deeds of mortgage, stating they had received instructions from Smith to pay him off. Mr. Joyce stated that the amounts due were not payable for three years.

Smith's attempt to get money failed, and on the 18th November he wired Joyce—"Can you let me have £200 urgent? any terms; negotiations over." Joyce informed Dudgeon & Emerson of the application, and they told him they had not been able to obtain the loan. He required from Smith a rental and further particulars regarding the property, and received same.

On the 2nd December Joyce sent to Dudgeon & Emerson an account, showing the amount due on notes, costs, premiums, and interest to date, making £1365 2*s*. 10*d*., and he informed Smith he had done so. Joyce consented to advance, and did advance, Smith £50 in cash, in this way—a remarkable transaction. He capitalised the principal and interest due on the first £140 note, and added £50, which, with stamps, made up £236 9*s*. 3*d*., and he sent Smith a note for this payable in three years. He fully explained the matter to Smith by letter, and Smith asked to have the note sent on, caring nothing about the terms provided he got the money.

On the 1st March, 1890, Dudgeon & Emerson wrote, offering to pay off the principal, with £5 per cent. interest, else that proceedings would be instituted to set aside the two deeds of mortgage. This was promptly and unconditionally refused by Joyce. The same offer and same threat was made by Rosenthal on the 29th March, 1890, on behalf of Smith, and Joyce gave a reply to him equally defiant. A writ was issued on the 17th July, 1890. This last proceeding was really taken on behalf of Englishmen holding incumbrances on Smith's property, which I shall presently refer to.

Were these transactions impeachable? I agree with the inferences of fact drawn by Judge Monroe as to what Smith knew. In *Rae* v. *Joyce* (1) we laid down the principles which, in our opinion, ought to be applied to such transactions—Was the bargain hard and unconscionable? And it is unnecessary to repeat those principles. In some respects this case is less defensible in equity than *Rae* v. *Joyce* (1). Here there is not even the pretence of an independent solicitor. There is the same rate of interest, the same charged on the costs; the monthly rests are here, 19 per cent., which it does not help Joyce to say were not insisted on; and we have him insisting on his three years of £60 per cent. as a term of receiving payment. We have also the fact of his capitalizing the £140 due on the note and interest, charging compound interest at that enormous rate. The premiums on the policies also are made to bear £60 per cent. The property was ample security for the loan, and yet the rigid terms of all Joyce's loans are insisted on. We were referred since the argument to a case of *Seaton* v. *Lewis* (2), reported at page 430 of the current volume of the *Times*' Reports. In my opinion *Rae* v. *Joyce* (1) rules this part of the case in principle, and therefore we must approach the second stage in the transaction on the assumption that Joyce's mortgages would not stand as securities for more than the principal money advanced, and interest at 5 per cent., which is the sum the claim offers. I may mention that Mr. Kenny expressly stated that he would argue the case on the assumption of the invalidity of these transactions.

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(1) 29 L. R. Ir. 500.

(2) 11 *Times*' Rep. 430.

I come now to consider the transactions of March and April, 1891. Before the estate became one in possession Joyce was making offers to buy the reversion out-and-out. On the 2nd December, 1889, Joyce wrote:—"If you are selling your reversion, let us know what you are getting for it before closing, and perhaps we may do better for you, and be prompter with the cash down." This was grasped at by the corporal in the 5th Lancers. On the 3rd December he wrote, acknowledging receipt of Joyce's letter, and asked in a postscript—"About what price would reversion bring?" Joyce replied by a letter, dated the 3rd December, in which he stated:—"Selling your reversion is probably the only way to deal with it now." Then followed some excellent advice: "I think you ought not to do that till you see if the money would be of good use to you in getting a commission in the army, or other position." And he cheapened the reversion in a N.B.—"I hear your father, although seventy, is a very active man. He may live as long as you, especially if you go to India or Egypt." Smith was pressing for a loan. On the 5th December the secretary of Joyce's Bank wrote:—"On further consideration of it, I am of opinion that we would not entertain the annuity; but if in future you deem it wise to dispose totally of your interest, I will go into a calculation and see what we would feel disposed to give. You can easily test if we are the best buyers you can get." On the 6th December, 1889, Smith indignantly denies the good health of his father, and adds—"Would you let me know, roughly, about the value of my reversion—what is the most you would give for it? I also insuring my life to you, and investing a sum for an annuity to pay the insurance yearly." £50 was at this time lent on the ruinous terms already stated. Smith pressed for a further loan, and mentioned his intention of going to Canada. Joyce wrote on the 16th January, 1890, that he would make no further loan on the reversion. He added:—"I might possibly, if you wanted finally to dispose of your entire interest, get a party who would risk a small sum to buy it out." This was named afterwards at £150. On the 1st March, 1890, Dudgeon & Emerson offered principal and £5 per cent., else a suit. This was at once repudiated. On the 8th March, 1890, Smith, with the knowledge of Dudgeon & Emerson in Dublin, was asking for another loan; and he told Joyce he had given Dudgeon & Emerson a mortgage for £150 for costs. On the same day Joyce wrote:—"I will give you £150 to purchase out your entire remaining interest in the property. This means, of course, I give you £150 clear, and also pay off the £150 mortgage you gave in January last. If you do not care to do this, I will lend you £30 additional on my mortgage."

Smith pressed for a loan of £120, but Joyce wrote on the 11th March:—"No; I won't lend £120; I would rather go a little higher to buy out your chance. Do what you think best." The amount of the loan was the subject of several communications. £30 was advanced on the 14th March, 1890. About this time Smith got into the hands of English money-lenders, who, in various forms, got security on his estate. The earliest of these was that of John Thomas Higgins, on the 26th March, 1890, and the latest was on the 10th October, 1890. On the 29th March, 1890, Rosenthal took the place of Dudgeon & Emerson, really acting for the London men, and offered principal and 5 per cent., with the alternative of legal proceedings. Joyce repudiated. The writ on the 17th July, 1890, followed, and the claim was delivered on the 5th March, 1891. Nothing further was done. On the 21st October, 1890 (after the last advance from the London lenders), Smith wrote:—"I am going to stop proceedings against you. Emerson has agreed to pay you. If he can't negotiate for immediate payment, would you purchase my equity of redemption? P.S.—I want to leave the country." The amount due to Joyce was £1952.

The next fact is the father's death in January, 1891, which made Smith's estate one in possession. On the 5th March, 1891, Rosenthal delivered the statement of claim in his action, which was served on the 8th. This brought Joyce into activity, and he wrote a letter to Smith on the 9th March, 1891. [His Lordship read the letter.]

In March, 1891, Smith called to see Joyce in Dublin, in response to Joyce's letter. Smith's condition was this: he was living hard and drinking. He was going abroad; he was convinced the whole case was a scramble between the money-lenders in London and the money-lenders in Dublin, and that in any event nothing would be coming to him out of the suit. Joyce had an overdue note of his in his hands—the last £30 lent. It is plain Joyce's object was to get rid of the action, which was nominally in the name of Smith, to maintain his mortgages in their entirety, with £60 per cent. against the London lenders, and to get into possession as mortgagee. He agreed to give Smith £250 as an advance on the mortgage, thus getting £60 per cent. on this, and to give £120 as the consideration for the purchase. Smith did not care in what form the £370 was given.

In substance £60 per cent. was charged on roughly two-thirds of the consideration for purchase. On the 31st March, 1891, Smith entered into agreements which he signed in his office. [His Lordship read the agreements, *ante*, pp. 449, 450.]

The necessity for an independent solicitor arose. It is said Rosenthal was mentioned, and rejected. Of course, he would not do; equally impossible was Emerson, and the Directory was had recourse to. Finally, Mr. Cornelius Walsh was chosen, at Joyce's suggestion. Smith signed an authority for Walsh to act, and Joyce sent him the two mortgages, the two agreements, and two assignments of policies, and statement of claim and the account with Joyce, showing £2326 4*s*. 4*d*. due. Walsh met Smith in the evening, and there was a discussion. Walsh advised him not to sell and part with everything; that he was acting foolishly; that possibly he would derive more benefit from the pending action. Smith would not take his advice. His sole idea was to get £370. He told Walsh he would get nothing out of the matter. Walsh performed his part, and in the short interview approved of the agreements. He, on the next day, entered a rule to change Rosenthal, thus getting control of the action, and, on the 2nd April, he entered a rule to discontinue. Joyce was informed of those steps. On the 2nd April he approved of the draft assignment of the equity of redemption for £120, which expressly keeps alive all Joyce's securities.

It is in these terms—[His Lordship read the deed, as set out *ante*, p. 451].

The transaction of 1891 must be considered in three aspects: as a confirmation, as a compromise, and as a dealing between mortgagee and mortgagor in respect of the equity of redemption. In all those aspects, what independent or useful advice did or could Walsh give? Smith had no definite idea how he stood with the London lenders, and Walsh had none whatever. He did not know the circumstances of the property, the age of the father or mother, or the value of the life estate. Smith came to Walsh to carry out already signed agreements. It does not appear that the infirmity of Joyce's transactions was ever seriously considered, nor the form of the transaction itself, making £250 an advance under the mortgages. The question whether Smith could not free himself from all these unconscionable transactions was not seriously discussed. One short interview closed the matter. These considerations illustrate the value of Walsh's letter of next day to Smith:—"If there be any point which you would like to have explained, I shall endeavour to do so, and as I have already explained very fully to you all that was required, and with which you were perfectly satisfied, perhaps there may be no necessity for any further. You will be good enough to attend here at one o'clock to-morrow, Friday, and you can close." And it was closed on the 3rd April. Smith got his money and went to Bechuanaland.

How can it be said that the transaction was a compromise? Joyce did not give up a farthing. He established his position of a £60 per cent. money-lender, with compound interest as to part, and got rid, as he hoped, of his real adversaries, the London creditors. The idea that for any purpose the mortgages should be treated as bearing less than £60 per cent., or should not be treated as good from the beginning, is contrary to the whole frame and object of the documents.

It is equally, I think, a misuse of terms to call them a confirmation. Smith had parted with all interest. The word "confirm" is used, no doubt, in the agreement of the 31st March; but Joyce never, in reality, bargained to confirm. He bought a buffer against the London creditors, and bargained to keep up the unconscionable bargain against them, in fact, increasing the burden by £250, so far as he could. What is in form a confirmation may be in reality an additional condemnation of the original transaction: *Wiseman* v. *Beate* (1).

(1) 2 Ver. 121.

Another equitable consideration enters into this case: It is well settled that the Court looks with jealousy on, and scrutinizes narrowly, dealings between a mortgagee and mortgagor in respect to the equity of redemption. The doctrine should be still more carefully applied where the mortgagee is the holder of securities unconscionable and voidable, and bases his rights on their validity. I look upon the purchase as a device to set up the mortgages by a transaction, in which the mortgagor was not adequately protected. We have had a large body of evidence from actuaries and others devoted to the question—What was the value of that which Joyce bought?—and going to show that, even taking Joyce to be entitled to his principal and £5 per cent., he was giving the full value, or more than the value. I do not admit the conclusion of fact; but in my view it is not material. The transaction is so indissolubly bound up with the desire to secure his £60 per cent. mortgages, and to get a buffer against the London creditors, that it is impossible to view it as a mere transaction of a purchase of the equity of redemption. It is an acquisition to protect a voidable and unconscionable mortgage, and which falls by the weakness of that to which it is attached.

Mr. Rosenthal's action for the benefit of the London creditors came to an end by the order for discontinuance of the 1st April, 1891, but they seem to have been determined that Joyce should not escape, and on the 18th February, 1892, Hill, one of them, presented a petition to make Smith a bankrupt. He was in Bechuanaland, and was treated as, and sworn to be, an absconding debtor, and, on the 19th April, 1892, he was adjudicated a bankrupt, and Kevans, the present plaintiff, was appointed trustee.

It was strongly contended before us, that the whole of these bankruptcy proceedings were fraudulent, and that we were at liberty to go into the title of Kevans, and inquire whether he was properly appointed and could sustain the suit, and that also that the action was tainted by maintenance and champerty.

I should be prepared to go more at length into the circumstances if I thought we were at liberty to do so; but I am of opinion that we are bound by the proceedings in bankruptcy to admit that Kevans is trustee, clothed with the powers and duties of such, and that any attempt to impeach his title must be made

Appeal. 1895.

KEVANS *v.* JOYCE.

Walker, C.

in the Bankruptcy Court in England. But I also think that the circumstances under which the present action was allowed to be brought preclude us from entering upon any such inquiry. It appears that in 1892 Mr. Joyce, in the name of his trustee Henry Duggan, presented a petition for the sale of Smith's estate comprised in his securities and the assignment of the 3rd April, 1891, and a conditional order for sale was made on the 8th November, 1892. Cause was shown by Edward Kevans by an affidavit of the 17th December, 1892, by which he impeached the mortgages of Joyce, and the conveyance to him upon the same grounds as this action is based upon, and Mr. Joyce swore an affidavit in reply. The case came before Judge Monroe on the 31st January, 1893, and the 6th February, 1893, and he then made an order that the petitioner should be at liberty to amend the petition and conditional order for sale by adding the name of Edward Kevans, trustee in bankruptcy, as an owner, and thereupon that the conditional order for sale should be made absolute; and it was ordered that the said trustee should be at liberty to institute proceedings forthwith, by writ in the Chancery Division, to impeach the securities of, or conveyance to, Thomas Joyce, and that said writ should be assigned to the Land Judge's Court, and a receiver was appointed.

An absolute order was made on the 17th February, 1893, and the sale is being carried on under it. This assumed Mr. Joyce's right to sell; but it was necessary, in order to the distribution of the proceeds of sale, that the extent to which his securities attached upon the lands should be investigated, and Mr. Kevans was authorised, as trustee, to raise the question by action. The order of the 6th February, 1893, is not appealed from, and precludes us, I think, from entertaining questions affecting Kevans' title.

The authorised writ was issued on the 15th February, 1893, and the defence was delivered on the 28th April, 1893.

We were much pressed by affidavits made in Africa by Smith in 1893. I attach no value to them. They were made in a form sent out, and were obtained for a price stipulated and paid, and Smith was evidently prepared to set himself up to the best bidder. His character may be judged of by a letter to Joyce, dated the 14th September, 1891, in which he wrote that unless he got

Appeal. 1895.

Kevans v. Joyce.

Walker, C.

money he was going to a bad climate, by reason of which the insurance would be avoided.

I by no means say that the statements in the declaration were prepared with a desire to misstate. There is a good deal of foundation for most of the statements; but it might have been better that Joyce had obtained earlier the advice which he refers to in his letter of the 7th February, 1894, viz. :—" I should not correspond with you, lest some unfair inference be given to such." I give this credit to Mr. Joyce, that where he fails it is by reason of the doctrines of this Court, and not by reason of his misstating facts.

There is one other matter I desire to mention. The securities given by Smith to the London creditors are not before us in this action. It was probably the intention of Mr. Justice Monroe's judgment of the 11th December, 1894, to make the moneys payable to Mr. Joyce a claim against the purchase-moneys in priority to any claim of those gentlemen under those securities. If that be not so, and Mr. Joyce is to be held to rank, for any part of his demand, puisne to these incumbrances, I think he should be at liberty to impeach each and every of these securities, and, if necessary, to use the name of Kevans for that purpose.

Another matter I wish to mention is this :—the question of the necessity for an amendment making the offer to redeem, and the declaration founded upon it in the judgment, has not been argued before us, and I express no opinion on it. Upon the whole, I think the appeal fails, and must be dismissed with costs.

FitzGibbon, L.J. :—

It is unnecessary for me to refer at any length to the facts, after the judgment of the Lord Chancellor, and I shall confine myself to stating the reasons for my conclusion.

I treat the case on the assumption that the transactions of 1889 were impeachable.

In the first place, from the personal point of view, we have in Smith a typical subject for that maternal favour which equity extends to prodigal sons. But his character and circumstances would not be enough if they stood alone, and, looking to the substance of Joyce's bargain with him, it appears to me " hard and

Appeal. 1895.

Kevans v. Joyce.

Fitz Gibbon, L.J.

unconscionable," in the sense in which those words are used in the authorities, in many particulars. There are the monthly rests; the power of sale without notice—a term so hard that the creditor did not attempt to enforce it; the small sums, such as £5 for the costs of the deed, made to bear interest at £60 per cent.; and above all, the provision that the loan was to stand out for three years. It seems to me that the fact that the dealing was with a reversioner, alone, is almost if not quite enough to render the whole bargain unconscionable, by reason of the introduction of this term. A reversioner has no present means: he can only pledge an expectancy, which, when it falls into possession, ought to be available to relieve his necessities. But if one of the conditions is that the onerous terms imposed when, and because, he had only an expectancy shall, for three years certain, remain charged upon his property, even if it falls in, this makes the bargain utterly unreasonable. What was the result of the transaction of 1889? The money liability could not be paid off in any event until 1892, and there would then be no less than £2326 due upon the security.

What was the transaction of 1891? It really was, on Smith's part, a sale of all he had left at a price which, so far as he was concerned, was not measured by any consideration of the true value of the property; and it is equally plain that Joyce did not measure the price by any consideration of the true value.

The subject-matter of the transaction of 1891 was an equity of redemption upon a voidable security. Smith was cleaned out, and could get nothing out of the property which he was purporting to sell. His measure of the price was whatever he could get in present money from Joyce, in a manner which would defeat the intermediate creditors. Joyce was buying, not Smith's property, for he had none, but whatever protection he could throw over his prior charge; and so clear was this to Joyce that he put down part of the money which he gave in 1891 as being included in the previous security. If the previous transactions were voidable, and if the true consideration for the dealing of 1891 was a confirmation of what was voidable, the debt of 1889 should have been calculated at the principal advanced, with £5 per cent. interest. On the other hand, if value had been given to Smith in 1889, the £2326, which was made part of the purchase-money, swamped the whole property. Therefore the reality of the transaction of 1891 was not to confirm doubtful rights, but to throw as much weight as possible upon the bargain of 1889, in order to defeat liabilities subsequently incurred to other persons, and to do so by what purported to be a sale of what was left after those liabilities. If I am right, the evidence of value has been given on a false basis. The actuarial calculation is that the value of the reversion in 1889, and the price paid in 1891, together amount to the fair value of the whole property. But the real question is, What was the property worth in 1891, with the charges upon it? In 1891 the property was no longer a reversion, but was £400 a-year in possession; and if the transaction of 1891 be treated as a confirmation of the charge of 1889, the amount of that charge should be taken at the advances, with interest at £5 per cent. But upon that basis we have no evidence, for £400 a-year in possession would be a very different thing from what Mr. Nahmer took as the subject of the valuation. The dealing of 1891 was a purchase by a mortgagee from a mortgagor of an equity of redemption, for the very purpose, and in the very manner, of which equity is most jealous. Joyce cannot escape from the position of dealing with a necessitous mortgagor, for the purpose of piling as much money as possible on to a mortgage already in existence, and actually inducing the mortgagor to increase the burden upon the equity of redemption which he was selling. The amount recoverable by Joyce must therefore be cut down to his actual advances and £5 per cent. interest.

We in no way meddle with the rights of the English creditors, who are not before us. But if they understand the position, I am not sure that they will be pleased with the prospect before them. The case must proceed on the assumption that the English bankruptcy is good, and that Kevans represents the general body of creditors, and not the English mortgagees alone. Kevans must administer the estate just as an official assignee would do in this country, and Joyce must have the opportunity of seeing that this is done by Kevans, and if not, of using Kevans' name if necessary. Joyce must have the same rights and powers against the other

Appeal. 1895.

Kevans v. Joyce.

Fitz Gibbon, L.J.

mortgagees which Kevans has possibly been put forward by those others to enforce against him.

The question about the offer to redeem is a difficult one, but it has not been argued before us. The case has been treated necessarily, and in my opinion rightly, as a proceeding taken by the Land Judge to ascertain priorities, for the purpose of a sale in the exercise of his jurisdiction. The offer to redeem has been made, and has been acted on by the Court. If Joyce is to get only £5 per cent., it seems to me that others cannot get any more until he has been repaid all his advances, with interest at that rate.

I agree that the appeal should be dismissed, with costs.

Barry, L.J.:—

After the very elaborate review both of the law and facts by my learned colleagues, I have but a very few observations to add. The case was argued with a good deal of that acerbity which is sometimes introduced even into law arguments in this country. Kevans was assailed as a co-conspirator of a London gang. I do not think that Kevans was deserving of that. He was a trustee in bankruptcy, and part of the duties of that calling was to take the proceedings which he was called upon to take. As to the London creditors, it is a curious fact that they were so severely criticised by counsel for Mr. Joyce. Joyce lent his money at large interest. He has a right to get that interest so far as the law will allow him. The London creditors did so too; they lent money at interest at a range varying from £70 to £300 per cent., and they are entitled to get their money if the law allows them to do so. I cannot understand the utility of this system of reciprocal vituperation. In a recent case a young wife, near the time of her confinement, both she and her husband being without means to purchase food, and with nothing before them but the workhouse, applied to Joyce for a loan, and went down almost on their knees to procure it. He advanced the money. The transaction was impeached by testimony which no one believed to be true; but notwithstanding that, the rule of equity as to dealing with reversionary estates, notwithstanding the statute as to the sale of reversions, is so stringent that the transaction was set aside. After the decision in *Rae* v. *Joyce* (1) it is impossible to hold that the transaction of 1889 could stand in a Court of Equity. But then came the transaction of 1891, and on that part of the case I entertain the gravest doubt. The transaction of 1891, if valid, amounted to a confirmation by Smith of the transactions of 1889 after his estate was vested in possession. He was *sui juris*. He knew well what he was at. The general rule as to confirmation of impeachable transactions is to be found in *Crowe* v. *Ballard* (2). In that case there was a bond, undoubtedly void, given by a borrower, and afterwards the borrower gave a new bond instead of it, and the question was—Was this subsequent bond valid? In giving judgment Lord Thurlow said:—" If a gentleman of rank, fortune, and honour, under age, in distress or otherwise, gives a bond, and afterwards conceives that he has made a hard bargain, and knowing that the bond is bad, will give a new bond, that will maintain the possession of the right of the holder of the bond, and this act shall be said to be a confirmation, *but not any act done under the influence of the former transaction* and the opinion that that bond is " good." Now, applying the rule there to the present case, in 1891, when the transactions of March and April took place, this young man was more than thirty years of age; he was therefore of full age, and everyone who had dealings with him agrees that, apart from his dissipated habits, he was a man of intelligence, who understood everything he was about. In the case put by Lord Thurlow, a gentleman of honour gives a new bond and the act would be a confirmation. Now, it is not stated that Smith was not actuated by honour. What was Smith's motive? He says he would stand by Joyce, because Joyce had befriended him, and if a sense of honour will uphold the transaction, why will not the motive to stand by the man who befriended him equally do so?

The deed of 1891 says:—" I hereby confirm the prior transaction." He had a feeling to benefit Joyce at the expense of the London creditors. The London creditors have a right to protect themselves against that if they can; but when the complete domination over the property belonged to Smith, I see no reason why

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(1) 29 L. R. Ir. 500.

(2) 3 Brown Ch. Cas. 116.

Appeal.
1895.

KEVANS
v.
JOYCE.

Barry, L.J.

the property being vested in possession, the expression "confirmation of the previous transaction" is not to be a confirmation in the ordinary sense of the word, and within the meaning of what Lord Thurlow laid down in that case to which I have referred. But then comes the difficulty in Joyce's way, namely, that the transaction relied on as a confirmation was a dealing between mortgagor and mortgagee, which is regarded by a Court of Equity, as Lord Redesdale says in *Webb* v. *Rorke* (1), with the greatest jealousy. To the same effect is the case of *Ford* v. *Olden* (2). The doctrine is unquestioned, that, as between mortgagor and mortgagee, dealings for the sale of the property are regarded with great jealousy. The transaction of 1891 was such that it is impossible for a Court of Equity to regard it as valid. Mr. Joyce said that Smith should take a solicitor to advise, and that one could be chosen from the Law Directory; but Walsh, the solicitor selected, advises against it, and says that Joyce's conduct is most unreasonable. How was that affair of 1891 concluded? Walsh having given the advice which was not taken, within twenty-four hours the whole thing was completed, without any knowledge of the value of the equity of redemption—concluded with a suspicious haste. It is said that it was the desire of Smith to get as soon as he could to Africa. Was it conducted in such a way as equity requires between mortgagor and mortgagee? I think not.

It is the consideration of the relation of these parties as mortgagor and mortgagee which induces me not to go the length of dissenting from the conclusion arrived at by my colleagues, and holding that this is a good confirmation. I should prefer, if it could be worked out satisfactorily, that a special decree should be made, not setting aside these securities at the suit of Kevans, but getting rid of this suit by declining to entertain it, with liberty to the English creditors to institute proceedings on their own behalf to impeach the confirmation of 1891 as being bad and fraudulent against them. But I think it is a most unsatisfactory conclusion, in the face of that confirmation, to allow Kevans, who is no more than Smith, to set aside the deeds of 1889; and I am not prepared to say that I would concur in the decree made setting aside the

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(1) 2 Sc. & Lef. 661. (2) L. R. 3 Eq. 461.

Appeal
1895.

Kevans
v.
Joyce.

Barry, L.J.

deeds of 1889, were it not that the subsequent transaction of 1891 is affected as being a dealing in respect of an equity of redemption between mortgagor and mortgagee.

Solicitor for the appellant: *Gerald Byrne.*
Solicitor for the respondent: *J. D. Rosenthal.*

R. D. M.

V.-C.
1896.
April 22, 23.
May 16.

ROCHE *v.* JORDAN.

(1895. No. 797.)

Charge of annuity on lands—Devise of lands charged—Portion of lands claimed by title paramount—No abatement of annuity—Amount payable in full out of remainder of lands.

A testator devised certain property to his daughter M. M. B. absolutely, and devised and bequeathed to his granddaughter A. E. the sum of £1000, or £50 per annum, whichever his executors should think fit or most advantageous for her, the said sum of £1000, or £50 per annum, to be paid by his said daughter, and to be chargeable and payable out of the property so bequeathed to her. One undivided third of the property was subject to the trusts of a settlement, under which M. M. B. took a life interest, with remainders over; and the testator had no power to dispose of same. In a cause petition matter brought by A. E. and her husband against M. M. B. and her husband, the petitioners were declared entitled to a perpetual annuity of £50 charged on the property devised to M. M. B.

On the death of M. M. B. the person entitled to the one-third in settlement claimed the same. There was nothing in the will to show an intention that the property was to be enjoyed by the chargeant and the devisee of the property itself in aliquot proportions:—

Held, that the annuity was not liable to abate, and that A. E. was entitled to be paid the same in full out of the remaining two-thirds of the property.

In re Saunders-Davies (34 Ch. D. 482) followed.

Long v. *Short* (1 P. Wms. 403) and *Jackson* v. *Hamilton* (9 Ir. Eq. R. 430) considered.

Action.

By deed of settlement dated the 15th November, 1836, and made shortly after the marriage of John Browne and Maria M. Browne, otherwise Eakins, amongst other provisions, Walter Eakins, the father of Maria M. Browne, granted to trustees one undivided third part of certain lands therein mentioned, upon the trusts thereinafter declared; and the said Walter Eakins covenanted with the trustees that he would stand seized and possessed of the full one-third of all other the property which he then had, or which he should be at the time of his death seized, possessed of, or entitled to, upon trust for the uses and purposes thereinafter mentioned, and that he, his heirs, executors, and administrators, would settle and assure the same to the trustees upon and for the same trusts and purposes; and it was declared that the said one-third of the property of the said Walter Eakins was limited to the trustees, to the use of Walter Eakins during his life; and after his death, and during the joint lives of John Browne and Maria M. Browne, to pay to the latter the annual sum of £200 for her separate use; and, subject to said annuity, to permit John Browne to receive the rents and profits for his life, and after his decease to permit Maria M. Browne to receive the said rents and profits during her life; and after the deaths of John Browne and Maria M. Browne, to the use of their children as they or the survivor should appoint; and in default of such appointment, to the use of their younger children or child.

John Browne predeceased Walter Eakins and Maria M. Browne. There were two children of the marriage, George Browne and Walter F. Browne.

Walter Eakins made his will, dated the 12th February, 1847, and thereby devised and bequeathed certain property (including some of the lands expressly settled) to Maria M. Browne, her heirs, executors, administrators, and assigns, for ever, and devised and bequeathed certain other property (including other portion of the lands expressly settled) to her for her life, same to be in lieu of the one-third of testator's property settled on her after his decease on her marriage; and the testator directed that his said daughter should have no claim on any other portion of his property on account of said marriage settlement, except as before in the will bequeathed to her; and after the death of Maria M. Browne he gave portion of the property so bequeathed to her for life to the said Walter F. Browne, and declared that he should have no claim on any other portion of testator's property under or by virtue of the said marriage settlement, except as before in the will bequeathed to him, which bequests were in lieu of any such claim; and in case the said Walter F. Browne died unmarried, &c., then the said premises to become the property of testator's grandson George Browne; and the testator left the remainder of the property so bequeathed to Maria M. Browne for life to George

V.-C.
1896.

ROCHE
v.
JORDAN.

Browne after her decease, with gifts over in certain events. The testator devised and bequeathed to his granddaughter Alicia Eakins the sum of £1000, or £50 per year, whichever his executors should think fit or most advantageous for his said granddaughter, said sum of £1000, or £50 per year, as the case might be, to be paid by his daughter the said Maria M. Browne, and to be chargeable and payable out of that portion of his property bequeathed to the said Maria M. Browne, her heirs, executors, administrators, and assigns for ever, as aforesaid; and the testator directed that after reserving out of the annual interest of said sum of £1000, or out of the said sum of £50 per year, as the case might be, an adequate sum for the maintenance, clothing, and education of his said granddaughter, his executors were to place the balance, if any, in Government or other approved security, and to account with her for the same on her attaining the age of twenty-one years; and in the event of his said granddaughter dying unmarried, or without leaving lawful issue her surviving, or before she attained the age of twenty-one years, then said sum of £1000, or £50 per year, so bequeathed to her as aforesaid, was to sink and not to be paid, but to be and remain the property of his said daughter Maria M. Browne, her heirs, executors, administrators, and assigns. And after other provisions, the testator devised and bequeathed to his said daughter the residue of his property, and appointed her and the Rev. William Moran and John T. Devereux executors of his will.

Walter Eakins died on the 16th June, 1855, and probate of his will was granted to Maria M. Browne.

Maria M. Browne afterwards married Charles B. Jordan, who predeceased her. There were children of that marriage, of whom Henry B. Jordan was one.

Maria M. Jordan elected to take the benefits conferred on her by the will, and did not seek to enforce her right under the settlement to a life estate in an undivided third of the real and personal estate of Walter Eakins. She went into possession of the property given to her by the will absolutely, and also of that thereby given to her for life.

Alicia Eakins married Patrick M. Slater, and in 1865 they presented a cause petition against Charles B. Jordan and Maria

M. Jordan, claiming to be entitled to a legacy of £1000 under the will. By a decree of the Lord Chancellor, made on the 17th November, 1865, it was declared that the petitioners were entitled, in right of the said Alicia Slater, to a perpetual annuity of £50, charged on that portion of the testator's property bequeathed to Maria M. Browne.

Patrick M. Slater died. His widow married John Roche, and by their marriage settlement the annuity of £50 was vested in Walter Eakins, jun., and John Lalor upon trust for the separate use of Alicia Slater.

Maria M. Jordan paid the annuity down to the 16th June, 1893. She died in August, 1894, having by her will, after a bequest of certain chattels, devised and bequeathed the rest of her property to Henry B. Jordan, whom she appointed executor, and to whom probate was granted.

The power of appointment given by the settlement of 1836 was never exercised.

Walter F. Browne, on the death of his mother, repudiated the conditions imposed by the will of Walter Eakins, and claimed to be entitled under the settlement to one-third of the property of which the testator died possessed.

Henry B. Jordan then refused to pay more than two-thirds of the said annuity of £50 per annum from the death of his mother, on the ground that he had been deprived of one-third of the property on which the said annuity had been charged. Walter F. Browne refused to pay any portion of the annuity.

The trustees of the settlement of 1836 and John Lalor were dead.

Alicia Roche, and Walter Eakins, jun., as her trustee, brought this action against Henry B. Jordan and Walter F. Browne, to have it declared that the annuity of £50 was well charged on two-thirds of the portion of the property of Walter Eakins devised by his will to Maria M. Browne absolutely, and to which Henry B. Jordan became entitled as her residuary legatee and devisee; and that Walter F. Browne was bound to elect between the settlement and will, and to make compensation to the plaintiffs out of the property devised to him for the withdrawal of one-third of the security for the annuity; and for consequential relief

Henry B. Jordan, by his defence submitted that, by reason of the election of Walter F. Browne to take under the settlement, the absolute devise and bequest to Maria M. Browne had been defeated to the extent of one-third of the property therein comprised, and that the said defendant was not bound to pay to the plaintiffs more than two-thirds of the annuity; or, in the alternative, that the defendant Walter F. Browne was bound, out of the property devised and bequeathed to him, to compensate Henry B. Jordan to the extent to which the latter might be disappointed by reason of such election.

Walter F. Browne alleged that he had elected to take under the settlement, but that he never claimed both the one-third of the property under the settlement and the devises and bequests in his favour in the will; and he submitted that he was not bound to give any substituted security for the annuity or any part thereof, and that he was entitled to elect without regard to same.

O'Connor, *Q. C.* (with him *Matheson*, *Q. C.*, and *Redmond Carroll*), for the plaintiffs:—

Here there is, in the first instance, a distinct independent gift of the legacy or annuity to Alicia Eakins, with a subsequent direction that it is to be paid by Maria M. Browne, and to be chargeable and payable out of the property bequeathed to her. This is not the case of a devise of lands subject to an annuity. The gift is in the nature of a demonstrative legacy directed to be paid out of the land: it is payable out of every portion of it, and it should not abate because one portion of the security has been taken away. The contention of the defendant Henry B. Jordan, if carried to its logical conclusion, would necessitate an abatement every time the testator's estate in any portion of the property charged with the annuity came to an end, and on each occasion there should be an inquiry how far the annuity should abate. It may be argued for the defendant that the gift of the annuity is a specific gift of part of the lands, and *Long* v. *Short* (1) may be relied on; but in that case there was no independent gift of the annuity such as there is here: the gift was of an annuity out of the testator's chattel estate at Kenn, and that was held to be a specific gift. In *Jackson* v. *Hamilton* (1) also there was no separate gift of the annuity. *Creed* v. *Creed* (2), so far as it applies, is an authority for the plaintiffs, for Lord Cottenham there says (p. 506) that there is no independent gift of the annuities unconnected with the direction that they should be charged upon and payable and issuing out of the real and freehold estates. Here the case is different, and it cannot be said that by giving security for the legacy the testator has made it liable to be defeated. In 2 Wms. Exors. (9th ed.), 1032, after citing *Long* v. *Short* (3), it is stated:—"But if it be apparent that the testator's meaning is to give the legatee *an annuity at all events*, the legacy will be a general one, though it is directed to be paid *out of* an estate or the rents of it; . . . ." Here we do not go the length of contending that the plaintiffs are entitled to be paid out of other property, but only out of every part of the lands charged.

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(1) 1 P. Wms. 403.

Further, the gift here is of £1000, or £50 a-year, whichever the executors think fit. It cannot be contended that if the executors elected to give the capital sum, that it would abate if the testator's estate in part of the lands determined, *ex. gr.* by ejectment for non-payment of rent or the expiration of a lease; and it would be strange if different principles were to apply to the annuity: see *Fowler* v. *Willoughby* (4), *Livesay* v. *Redfern* (5), *Savile* v. *Blacket* (6). Moreover, it is now too late to raise the question of abatement, as, in the suit of *Slater* v. *Jordan*, it was declared that the plaintiff was entitled to the annuity charged on the portion of the testator's property bequeathed to Maria M. Browne; and the defendant Henry B. Jordan cannot now say that it is not charged on every part of it.

As regards the defendant Walter F. Browne, though he has elected to take under the settlement, he holds the property given to him by the will, and the plaintiff is entitled to compensation out of that, if necessary.

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(1) 9 Ir. Eq. R. 430.
(2) 11 C. & F. 491.
(3) 1 P. Wms. 403.
(4) 2 Sim. & St. 354.
(5) 2 Y. & C. Ex. 90.
(6) 1 P. Wms. 778.

[*In re Saunders-Davies* (1) and *In re Bawden* (2) were also referred to.]

Price, Q.C., and *Daniel F. Browne*, for Henry B. Jordan:—

The rentcharge was charged on the entire property given by the will of Walter Eakins to Maria M. Browne absolutely, and one-third of that property having been taken under the paramount right, the remainder is liable to two-thirds only of the rentcharge, the plaintiff Alicia Roche being compelled to look to the property given by the will to Walter F. Browne to pay the residue of her annuity: *Jackson* v. *Hamilton* (3); *Creed* v. *Creed* (4).

Once it is admitted that the gift of £1000, or £50 a-year, is not a demonstrative legacy, the distinction taken on the other side on the ground that there is an independent gift entirely fails in effect, and *Jackson* v. *Hamilton* (3) is a direct authority in favour of the defendant. In *Creed* v. *Creed* (4) Lord Cottenham cites *Long* v. *Short* (5), and gives his approval of its principle, viz. that a gift of a rentcharge out of land is equally specific with a gift of the land itself. There is no more an independent gift of the annuity here than there was in *Creed* v. *Creed* (4), and the passage cited from the judgment of Lord Cottenham (p. 506) does not carry the plaintiffs' case further. In *In re Saunders-Davies* (1) the gifts were of lump sums for portions, not of rentcharges, and the nature of the gifts is dealt with in the judgment; there is no disapproval of *Jackson* v. *Hamilton* (3). *In re Bawden* (2) also, was the case of gifts of sums of money, and Kekewich, J., felt himself bound to follow the decision in *In re Saunders-Davies* (1). In his judgment, after referring (p. 703) to the principle of *Long* v. *Short* (5), and to *Jackson* v. *Hamilton* (3), he says:—"There is much to be said in favour of that view of the principle and of the authorities; but I am placed in this difficulty, that some six years ago this very point was considered by Mr. Justice North, and dealt with by him in a reserved judgment, in which he discussed all the cases at length, and deliberately refused to apply *Long* v. *Short* (5) to such a case as I have here. To my mind it would be most unsatisfactory for me to depart in any way from Mr. Justice North's decision." The passage in 2 Wms. Exors., from which counsel for the plaintiffs quoted, is in the defendant's favour. It is there (9th ed., p. 1032) stated that a bequest of a rent out of a term of years is specific. The passage cited would have no application unless the gift to the plaintiff were a demonstrative legacy, which is not contended. The alternative gift of £1000 cannot be coupled with that of the rentcharge. Moreover, in *In re Saunders-Davies* (1) a term of years was limited on trust to raise the portions, and the deficiency was caused by the existence of debts, and not by a sweeping away of portion of the property, as here; and that case does not rule the present. Further, the decision of Brady, L. C., in *Jackson* v. *Hamilton* (2) ought to be followed in preference to that of North, J., in *In re Saunders-Davies* (1).

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(1) 34 Ch. D. 482.
(2) [1894] 1 Ch. 693.
(3) 9 Ir. Eq. R. 430.
(4) 11 C. & F. 491.
(5) 1 P. Wms. 403.

Serjeant Campion, Q. C. (with him *Wakely*), for Walter F. Browne.

Matheson, Q.C., for the plaintiffs, in reply:—

There is strong evidence on the face of the will that the testator intended that his granddaughter should have the legacy or annuity, at *all* events: see the judgment of Brady, L.C., in *Jackson* v. *Hamilton* (2). The fact that the executors had a discretion as to which she should receive cannot affect her rights in this respect. The defendant's case is founded on *Jackson* v. *Hamilton* (2); but there Lord St. Leonards (then Sir Edward B. Sugden), L.C., reserved his judgment, not being satisfied that the report of *Long* v. *Short* (3) was accurate, and he never did decide the question before him; and Brady, L.C., who eventually decided the case, considered that it was governed by *Long* v. *Short* (3): see p. 438, where he says:—"The case of *Long* v. *Short*, as reported in Peere Williams, undoubtedly appears to be exactly this case . . ."; and further on—"Therefore, on the authority of *Long* v. *Short*, or rather on the authority of the principle of it, as it appears to have been understood and dealt with, I do not see any reason to distinguish this case in principle from the general class

(1) 34 Ch. D. 482. (2) 9 Ir. Eq. R. 430. (3) 1 P. Wms. 403.

V.-C.
1896.
ROCHE
v.
JORDAN.

of cases I have adverted to." But the report of *Long* v. *Short* (1) proved to be inaccurate, and North, J., in the case of *In re Saunders-Davies* (2), shows (p. 488) that it did not decide the proposition for which it was cited; and, at p. 489, he says:—"I have looked at the cases in which Lord St. Leonards said that *Long* v. *Short* had been recognized as a binding authority, and it does not appear to me that any of them touch the specific point for which he cited *Long* v. *Short*"; and he then states that on investigation it was found that the facts of that case were not such as described in the report, and shows that the decision in *Jackson* v. *Hamilton* (3) was based on a wrong interpretation of *Long* v. *Short* (1), that the latter case did not decide that, as between an annuity and the lands on which it was charged, the annuity should abate, but merely that an annuity charged on a specific chattel should abate rateably with legacies of other chattels real; and he follows the decision in *Raikes* v. *Boulton* (4).

In re Saunders-Davies (2) was the case of legacies of capital sums for portions, and if the executors here had determined to give the plaintiff the sum of £1000 instead of the annuity, that case would be a direct authority; but the fact that they have not done so cannot affect the plaintiffs' right; and, moreover, North, J., in that case drew no distinction between a capital sum and an annuity. The plaintiff here has a stronger case than that of the portioners in *In re Saunders-Davies* (2), for there there was a term to raise the portions which amounted to a gift of part of the lands themselves. Even if *Jackson* v. *Hamilton* (3) applied, the Court ought to follow the more recent cases in preference, as was done by Kekewich, J., in *In re Bawden* (5).

May 16.

THE VICE-CHANCELLOR:—

The only question to be now decided is whether the annuity of £50 given by the will of Walter Eakins is liable to abate by reason of one-third of the property on which it was charged being withdrawn from the operation of the will, by the election o

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(1) 1 P. Wms. 403.
(2) 34 Ch. D. 482.
(3) 9 Ir. Eq. R. 430.
(4) 29 Beav. 41.
(5) [1894] 1 Ch. 693.

Walter F. Browne to take under the settlement of the 15th November, 1836, and against the will.

By that settlement one undivided third of certain lands of Walter Eakins was conveyed on trusts, under which Walter F. Browne, in the events which happened, became entitled to this one-third.

The testator purported to dispose of the whole of these lands by his will to different persons, and then proceeded as follows:—[His Lordship read the devise to Alicia Eakins, and subsequent portions of the will.] The executors, in exercise of the power given them, decided that it was "fit and most advantageous" for Alicia Eakins to take the annuity of £50 instead of the £1000, and their decision was affirmed and given effect to by the decree of this Court in the suit of *Slater* v. *Jordan*. The annuity was thenceforth paid in full to the 16th June, 1893, to the plaintiff Alicia Slater, who afterwards married J. Roche, since deceased. Mrs. Jordan died in August, 1894, and the defendant H. B. Jordan, who, after her death, became entitled to the remaining two-thirds of the property charged with the annuity by the will of Walter Eakins, refused to pay more than two-thirds of the annuity, contending that by reason of the election of the defendant Walter F. Browne to take the other one-third of the property under the settlement, the annuity must be abated to two-thirds of its amount.

This raises a question of importance and difficulty, which requires a consideration of the principle supposed to be established by the case of *Long* v. *Short* (1), and the case in this country of *Jackson* v. *Hamilton* (2), decided by Brady, L.C. It was contended that these cases establish a general rule that when a will creates a charge on real estate, by way of rentcharge payable out of such real estate, and then devises the real estate subject to the rentcharge, both the rentcharge and the estate given subject to it are to contribute rateably to making good any insufficiency resulting from the real estate becoming of less value. The same contention has been raised as to money charged by will on real estate devised by the same will. It is now clear, on a careful examination of

(1) 1 P. Wms. 403. (2) 9 Ir. Eq. R. 430.

the facts of the case of *Long* v. *Short* (1), that no such question was decided there. I need only refer to the judgment of Mr. Justice North in the case of *In re Saunders-Davies* (2), as conclusively proving this. Indeed the observations of Sir Edward Sugden in *Jackson* v. *Hamilton* (3), on the facts ascertained from the Registrar's book, though not amounting to a decision of the question, indicate that he was disposed to take the same view of that case as was afterwards so clearly expounded by Mr. Justice North. There can be no doubt that the devise of a rentcharge is equivalent to a specific devise of so much of the land on which it is charged, and that the rentcharge is liable to contribute, with other real estate, to payment of the testator's debts. But that between the devisee of the rentcharge and the devisee, by the same will, of the land on which it is charged, and subject to which it is given, the rentcharge is to abate for the benefit of the latter, in case the land is no longer of the same value to the devisee, seems to me to be a strong proposition. This view seems, however, to have been taken by Brady, L.C., in *Jackson* v. *Hamilton* (3). In the present case the question arises as between the devisee of the rentcharge and the devisee and legatee of the property charged with it, and given subject to it. The testator had, by reason of the prior settlement, no ownership in, or disposing power over, one undivided third of the property charged; but he endeavoured by his will to acquire a disposing power by the operation of election. In this his intention was frustrated by the election of the owner of the one-third to take against the will. The owner of the lands, &c., charged with the rentcharge now contends that as he has thus lost the one-third of the property, the devisee of the rentcharge must lose one-third of it as a rateable proportion. If such a proposition were to be established it would lead to far-reaching and very inconvenient consequences. I cannot see how it could fail to apply to cases where at any time and for any cause, as for instance eviction of a part of the hereditaments charged, by title paramount or for non-payment of rent, a portion of the property charged has been lost. This would introduce an element of uncertainty not likely to be contemplated by a testator, and not to be deemed his

(1) 1 P. Wms. 403. (2) 34 Ch. D. 482. (3) 9 Ir. Eq. R. 430.

intention without very clear language that he did so intend. In my opinion, in the absence of such expressed intention, a gift, subject to a charge created by the same will, means what it in effect says, namely, that the charge is to be provided for before the devisee or legatee of the property on which the charge is imposed is to get anything, and such devisee or legatee has no equity to contend that the owner of the charge and he are, practically through the subsistence of the charge, to take the property in shares. If there are words in the will sufficiently showing an intention that the charge was intended to be a share in that sense —if the property was to be enjoyed by both in aliquot proportions, to be ascertained by valuing the charge on the one hand and the property charged less by the value of the charge on the other, then such intention must be carried out independently of inconveniences or difficulties. But it would require clear language to induce me to come to such a conclusion. It then would become a question of construction. I do not see any difference in these respects between a rentcharge or annuity and a money charge. Here the will gives either a rentcharge or annuity of £50 a-year, or a gross sum of £1000, at the discretion of the executors, who decided that Alicia Roche should take it as £50 a-year.

In the case of *Raikes* v. *Boulton* (1), before Sir J. Romilly, M.R., a similar question arose as to a money charge to be raised by a term created for the purpose out of real estate, which, he held, was not liable to contribute rateably to payment of debts. That case was approved of and followed by North, J., in *In re Saunders-Davies* (2), to which I have already referred, and in which he held upon careful consideration, that children entitled to portions to be raised out of real estate by a trust term created by the will, subject to which the real estate was devised in strict settlement, were not bound to contribute to payment of debts upon a deficiency of the personal estate for payment of the testator's debts. I concur in the opinion expressed by him, and I prefer to follow his decision.

As I have already pointed out, the context of such a will may be resorted to in order to show by way of construction that an intention is sufficiently shown to exclude the application of this rule. In the present case, if I were to deal with it upon the construction of the will, so far from any intention being shown to subject the provision for the testator's granddaughter to this liability, I am of opinion that there is enough to show a contrary intention. Alicia Eakins was a special object of testator's bounty. He desired to make a present provision for her maintenance, clothing, and education. He left her for this purpose a moderate present provision, to be in the shape either of an annuity of £50 or a gross sum of £1000, and empowered his executors to decide which they considered more advantageous to her, and directed them to reserve for her an adequate sum for her maintenance, clothing, and education, and to accumulate the balance and to account with her for the same on her coming of age. He charged this provision on property left by him to his daughter Maria M. Browne, which would be ample for the purpose, and he directed that in case Alicia should die unmarried or without lawful issue, the £1000 or the £50 a-year should sink and not be paid, but should be and remain the property of Maria M. Browne, her heirs, executors, administrators, and assigns. It seems to me that this shows an intention to provide for her to the full extent expressed before any benefit could be claimed by Maria M. Browne from the property charged with this provision. There is nothing whatever to show an intention that the amount of the provision for Alicia should depend in any way on the value of the property on which the testator charged it; nothing to show that he was parcelling out in aliquot parts this property between the charge imposed on it and the beneficial interest of Maria M. Browne.

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(1) 29 Beav. 41.

(2) 34 Ch. D. 482.

I therefore hold that Alicia Eakins is entitled to be paid her £50 a-year in full out of the remaining two-thirds of the property charged, and the compensation fund, whatever it may be, to which Maria M. Browne will be entitled in respect of the other one-third of the property expressed to be charged.

Solicitors for the plaintiffs: *Meldon & Co.*
Solicitor for Henry B. Jordan: *James Goff.*
Solicitor for Walter F. Browne: *Martin Huggard.*

D. M'C. M.

IN RE WATERFORD AND LIMERICK RAILWAY CO.; EX PARTE BARON HARLECH.

V.-C.
1896.
April 27.

(1896. No. 285.)

Costs—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 80, 82—*Order appointing trustees of settlement for purposes of Settled Land Acts.*

By deed of re-settlement, made in 1881 estates were limited (subject to charges created by a deed of settlement of 1850) to the use of H. for life, with remainders over. Both deeds contained powers of sale, but the trustees were not the same persons. Portions of one of the estates were taken by a railway company, under compulsory powers, which incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid into Court. For the purpose of having it paid out, H. applied in the matter of that estate to have W. and L., the trustees of the deed of 1881, appointed trustees for the purposes of the Settled Land Act, 1882, of the compound settlement consisting of the said two deeds, and an order was made accordingly. On an application by H. for payment out of Court of the purchase-money to W. and L.:—

Held, that the railway company ought not to be ordered to pay the costs of obtaining the order appointing W. and L. trustees for the purposes of the Settled Land Act.

SUMMONS by Baron Harlech for the transfer to the Marquis of Winchester and the Honourable Henry Charles Legge of the consols in Court to the credit of the matter, and for the payment to the applicant of the cash standing to the same credit, and that the Waterford and Limerick Railway Company might be ordered to pay the costs of the application, and also the costs of an order dated the 25th February, 1896, made under the Settled Land Acts.

By an indenture, dated the 9th February, 1850, and made on the marriage of Baron Harlech (then William Richard Ormsby Gore) with Emily Charlotte Seymour, certain estates, including the Tubbercurry estate in the county of Sligo, were limited, subject to charges afterwards released, and to life estates and a jointure which subsequently determined, and to portions for the younger children of Baron Harlech, to the use of Baron Harlech for life,

V.-C.
1896.

In re
W. & L.
Railway Co.
Ex parte
Harlech.

with remainder to his first and other sons in tail male, with remainders over; and a power of sale of the said estates was given to Mark Anthony Saurin and George Henry Seymour, trustees of the said indenture.

There were children of the marriage.

By an indenture, dated the 21st July, 1881, Baron Harlech and his eldest son disentailed the estates; and by an indenture of re-settlement, dated the 22nd July, 1881, the said estates were, pursuant to powers in that behalf contained in the disentailing deed, limited, subject to the portions charged in 1850, to the use of Baron Harlech for life, with remainder to the use of his said eldest son for life, with remainders over: and it was declared that it should be lawful for the trustees, Augustus J. H. Beaumont Paulet, subsequently Marquis of Winchester, and the Honourable Henry Charles Legge, at the request of Baron Harlech during his life, and afterwards of his said eldest son during his life, and afterwards, at the request of the persons therein mentioned, to sell all or any parts of the said estates, and for that purpose to revoke the uses thereinbefore declared.

The Waterford and Limerick Railway Company, under compulsory powers which incorporated the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), acquired certain portions of the Tubbercurry estate, and they lodged in Court the sum of £321 2*s.* 8*d.*, the purchase-money awarded therefor. The said sum was now represented by consols, on which a cash dividend had accrued.

On the application of Baron Harlech, made In the matter of the Tubercurry estate, settled (with other estates) by the settlement made by the said two indentures of the 9th September, 1850, and the 22nd July, 1881, and in the matter of the Settled Land Acts, 1882 to 1890 (1896. No. 131), the Vice-Chancellor made an order, dated the 25th February, 1896, appointing the Marquis of Winchester and the Honourable Henry Charles Legge trustees, for the purposes of the Settled Land Act, 1882, of the settlement, consisting of the said two indentures, and directing that the applicant's costs of the application should be taxed as between solicitor and client, and that same, when so taxed, should be paid out of the property, subject to the trusts of the said settlement, so far as same might not be otherwise provided for.

This order was applied for solely for the purpose of having the said purchase-money paid out to the trustees.

The Vice-Chancellor, being prepared to make the order for transfer and payment of the funds in Court, intimated that the application as to the costs of the order of the 25th February, 1896, asked the Court to go farther than had been done in any previous case.

Garrett Walker, for the applicant:—

In *In re Belfast and Northern Counties Railway Co.; Ex parte Gilmore* (1) the Master of the Rolls decided that the Company should pay the costs of registering the title under the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66).

[The Vice-Chancellor: The order of the 25th February, 1896, appoints trustees in respect of the entire Tubbercurry estate. Why was that order necessary?]

The deeds of the 9th February, 1850, and the 22nd July, 1881, constituted a compound settlement, of which it was necessary to have trustees appointed for the purposes of the Settled Land Act, 1882: see *In re Marquis of Ailesbury and Lord Iveagh* (2). The present is a stronger case against the Railway Company than *In re Midland Great Western (Ireland) Railway Co.; Ex parte Rorke* (3), which followed the decision of this Court in *City of Dublin Junction Railways; Ex parte Kelly* (4), for there, *prima facie*, administration would have been necessary for the purposes of the intestates' estates generally; whereas, here the order applies to the Tubbercurry estates only, and not to the entire property.

[The Vice-Chancellor: Is there any reported case in which a railway company was ordered to pay the costs of a disentailing deed not confined to the money in Court? The order of February directs the costs of the application to be paid out of the trust property, so far as same might not be otherwise provided for. How

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(1) [1895] 1 Ir. R. 297.
(2) [1893] 2 Ch. 345.
(3) [1894] 1 Ir. R. 146.
(4) 31 L. R. Ir. 137.

V.-C. 1896. In re W. & L. Railway Co. Ex parte Harlech.

do you show that you could not have obtained payment without the order?]

On the first point, there is no direct authority. The special provision as to the costs was asked for expressly in order that the applicant might not be debarred from claiming these costs against the Company. Owing to the incumbrances, and the fact that the trustees of the two deeds were different persons, payment could not have been obtained without the order. The Settled Land Act, 1890 (53 & 54 Vict. c. 69), enables capital money in Court to be paid out to trustees of the settlement for the purposes of the Settled Land Acts (sect. 14).

J. FitzGerald Murphy, for the Railway Company:—

The order asked for as to costs would go beyond previous decisions as to the liability of a railway company in such matters. The tenant for life could have himself obtained payment of the dividends. There was no necessity for having trustees appointed.

THE VICE-CHANCELLOR:—

I decline to make a precedent charging a railway company with the costs of such an order as that of the 25th February, 1896. To do so would be to go beyond any decided case. I shall make the usual order as to costs.

Solicitors for Baron Harlech: *H. T. Dix & Sons.*
Solicitor for the Railway Company: *John O'Connor.*

D. M'C. M.

MACKESY *v.* MACKESY.

(1895. No. 800.)

M. R.
1895.
Dec. 11.

Will—Construction of—"All my estate and interest in the lands of A."—Beneficial interest in mortgage belonging to testator held to pass.

A testator being possessed of a fee-simple estate in the lands of A., and also being beneficially entitled to a sum of money secured thereon by mortgage, devised all his estate and interest in the lands of A. to his son W. for life, with remainder to his first and other sons in tail male; and in default of issue of his son W., to his son G. for life, with remainder to his first and other sons in tail male, with remainder over; and devised and bequeathed the residue of his property to his son W.:—

Held, that the beneficial interest in the mortgage money passed under the specific devise of the lands.

SUMMONS.

This was an application on behalf of George Ivic Mackesy, grandson of Thomas Lewis Mackesy, deceased, against the Rev. Thomas Lewis Mackesy and William Harris Lloyd, the executors of the Rev. William Poulter Mackesy, the eldest son of the said Thomas Lewis Mackesy, deceased, to determine, amongst other questions, whether the interest which Thomas Lewis Mackesy, deceased, had in a sum of £5600, secured upon mortgage of the Aughnacart estate, passed along with, and was part of, the devise and bequest in the will of the said Thomas Lewis Mackesy of all that and those his estate and interest in the lands of Aughnacart, or passed under the devise and bequest of the residue of his property in the said will contained.

The facts of the case were as follows:—In 1850 the testator purchased the fee-simple of the lands of Aughnacart in the Incumbered Estates Court for the sum of £6300. £5600, part of the purchase-money, was advanced by the trustee of the testator's marriage settlement out of the funds subject to the trusts of the settlement. These funds consisted of a sum of £9000, £4500 of which was contributed by the testator, and £4500 by his wife

M. R.
1895.
MACKESY
v.
MACKESY.

Helen Mackesy. The trust funds were held on trust (after the determination of the life interests thereby given to the testator and his wife, respectively) in the event, which happened, of there being no child of the marriage, as to one moiety of the £9000, for such person or persons as the testator should by deed or will appoint, and in default of appointment for his next-of-kin; and as to the other moiety, for such person or persons as the said Helen Mackesy should by deed or will appoint. By deed poll, dated 13th August, 1852, Helen Mackesy appointed that £2800, part of her moiety, should (subject to her life interest therein) be held in trust for the testator. By deed of the 3rd May, 1853, the testator conveyed the lands of Aughnacart to the trustees of his settlement, upon trust to secure repayment of the sum of £5600 advanced, and interest thereon at the rate of 4 per cent. during the life of his wife Helen Mackesy, and, subject thereto, in trust for himself, his heirs and assigns. The testator made his will, dated 2nd April, 1869, and thereby devised and bequeathed (subject as thereinafter mentioned) unto and to the use of his eldest son the said William Poulter Mackesy during his life, all that and those his estate and interest in the lands of Aughnacart without impeachment of waste; and after his decease to the use of his first and other sons successively in tail male; and in default of such issue, to the use of his grandson George Ivic Mackesy during his life, without impeachment of waste; and after his decease to the like uses, and to the same persons, and similarly entailed and vested in every respect as the lands of Dunkitt and Farnogue, which were thereinbefore limited to the use of the first and other sons of the said George Ivic Mackesy successively, in tail male, with divers remainders over; and the testator devised and bequeathed the residue and remainder of his property to his eldest son the said William Poulter Mackesy absolutely, and appointed his two sons William Poulter Mackesy and Henry Vincent Mackesy his executors.

The testator died on the 8th April, 1869, and his son William Poulter Mackesy entered into receipt of the rents and profits of the Aughnacart estate. Helen Mackesy survived the testator, and died on the 14th August, 1870, having previously by her will confirmed the appointment to her husband of £2800, stating that it was the moiety of an investment towards the purchase of Aughnacart, and appointed the residue of her moiety of the trust funds to other persons.

By deed of the 7th February, 1871, the trustees of the testator's marriage settlement transferred to his executors the mortgage debt of £5600 and the securities therefor, and the residue of his share of the trust funds, to hold upon the same trusts as the same had been theretofore held, or such of them as were still subsisting; and the executors gave a release to the trustees of the settlement.

A tenant of part of the lands of Aughnacart, who held under a fee-farm grant, made to him in the year 1888 by the Reverend William Poulter Mackesy, in the year 1891 agreed to sell his interest through the medium of the Irish Land Commission, under the Land Purchase Acts, to the tenant in possession, and on investigating the title the Irish Land Commission required the fee-farm rent, £13 19*s*., to be redeemed. The redemption price was fixed at £275, and this was paid to William Poulter Mackesy, as surviving executor of the testator (Henry Vincent Mackesy, the other executor, having died meantime), in part discharge of the mortgage of £5600. William Poulter Mackesy, however, believing that the testator, when he made his will, considered that this charge was non-existent, and not being aware, until an affidavit of title was prepared for the Land Commission, that he could have any claim to the charge, declined to accept the £275 as his own money, and stated that it should be treated as part of the entailed estate, less expenses incidental to making title; and accordingly, as there were no trustees of the testator's will, that sum, less £12 expenses, was invested in Bank of Ireland stock in the joint names of William Poulter Mackesy and George Ivie Mackesy.

William Poulter Mackesy died without issue on the 18th October, 1894, having by his will devised and bequeathed his property upon trust to pay the income thereof to his wife for life, and after her death to pay certain legacies, and subject thereto to pay one moiety to his nephew Thomas Lewis Mackesy, and to stand possessed of the other moiety for the benefit of his nephew Vincent Mackesy for life, and after his death in trust for the issue of the said Thomas Lewis Mackesy as therein mentioned; and in

M. R.
1895.
MACKESY
v.
MACKESY.

default of such issue, upon the further trusts therein mentioned, and appointed the said Thomas Lewis Mackesy and W. H. Lloyd his trustees and executors.

On the death of the said William Poulter Mackesy, George Ivic Mackesy succeeded to the said estate as tenant for life.

This summons was taken out by him to have the question determined whether the charge was still subsisting.

George Price, Q.C., in support of the summons.

Gerald FitzGibbon, for the defendants T. L. Mackesy and W. H. Lloyd.

[The following authorities were referred to :—*Leckey* v. *Watson* (1) ; *Tufnell* v. *Page* (2) ; *Clifford* v. *Clifford* (3) ; *Farmer* v. *Bradford* (4) ; *Re Clowes* (5).]

THE MASTER OF THE ROLLS :—

This case comes before me on an originating summons brought by George Ivic Mackesy against the Rev. Thomas Lewis Mackesy and William Harris Lloyd, to determine the following, amongst other, questions, namely—whether the interest which the said Thomas Lewis Mackesy, deceased, had, and over which he had disposing power, in the sum of £5600 9*s.* 7*d.*, secured by mortgage of the Aughnacart estate in the Queen's County, passed along with and as part of the said estate under the devise and bequest in the will of the said Thomas Lewis Mackesy, deceased, of all that and those his estate and interest in the lands of Aughnacart, or whether it passed under the devise and bequest in the said will contained of the residue of his property.

It is not necessary for me to recapitulate the facts, which are stated in the affidavit of the applicant George Ivic Mackesy. The only important matters are as follows :—

The testator at the time of his death was seized in fee of the lands of Aughnacart, which he had bought in the Incumbered Estates Court for the sum of £6300. Portion of the purchase-money, namely, £5600, was advanced by the trustees of his marriage settlement, and this advance was secured by a mortgage of the lands by the testator to the trustees. The trust funds, out of which this £5600 was advanced, consisted of £9000, of which £4500 had been put in settlement by the husband and £4500 by the wife. Under the trusts of the settlement, and in the events which happened, the testator became absolutely entitled to the trust funds brought in by him. The wife's trust fund was subject to her power of appointment, and she exercised this in favour of her husband to the extent of £2800, which represented the proportion which her trust fund contributed to the advance of £5600. He was thus beneficially entitled to the whole £5600.

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(1) Ir. R. 7 C. L. 157.
(2) 2 Atk. 38.
(3) 9 Hare, 675.
(4) 3 Russ 354.
(5) [1893] 1 Ch. 214.

The question I have to consider is one of construction. If the mortgage of £5600 is not included in the devise of Aughnacart, it passes under the residuary gift. Bearing in mind the position of the testator at the time he made his will, I come to the consideration of the clause in the will on which the question turns. It is as follows:—"I give, devise, and bequeath, subject as hereinafter mentioned, unto and to the use of my eldest son the Rev. William Poulter Mackesy, during his life, all that and those my estate and interest in the lands of Aughnacart, including the purchase of Lodgefield, lately made by me in the Landed Estates Court, Ireland, situate in the barony of Clarmallagh in the Queen's County, without impeachment of waste; and after his decease, to the use of his first and other sons successively, according to seniority of age, in strict tail male; and in default of such issue, and after the failure and determination of the uses and estates hereinbefore limited, then to the use of my grandson George Ivic Mackesy during his life, without impeachment of waste; and after his decease, then to the like uses, and to the same persons, and similarly entailed and vested in every respect whatsoever as the said lands of Dunkitt and Farnogue."

These last-mentioned lands had been devised in the earlier part of the will to the use of the Rev. William Poulter Mackesy for life, and after his death to the use of George Ivic Mackesy during his life, and after his death to the use of his first and other sons in tail male. The last part of the clause I have read does not affect the question whether the mortgage debt passed under the devise of the testator's estate and interest in the lands of Aughnacart; but it was relied on as indicating that the testator could not have intended to include the mortgage debt, because, after the determination of the life estate, the lands and the mortgage might devolve upon different persons, bearing in mind that words which confer an estate tail in lands would pass an absolute estate in personalty. It may also be noticed that the presence of the words "without impeachment of waste" are applicable only to real estate. But, after all, this is not conclusive of the intention of the testator, for though the personalty might go in a different way from the lands, *e.g.* if the first tenant in tail died intestate, this would not necessarily be so, as the first tenant in tail might have barred the remainder or settled the charge. Such a circumstance too often exists in the case of the gift of a blended fund, and therefore it cannot be said to be a conclusive indication of a contrary intention, if the actual words of the devise are sufficient to carry the mortgage debt.

Mr. Price cited several cases to show that the word "estate" is to be given a wide construction. These were chiefly cases before the Wills Act, in which it was held that the word "estate" comprised an absolute interest. Inasmuch as before the Wills Act a gift of land without words of limitation gave only a life estate, while it was felt that such a rule often defeated the intentions of testators, who, in devising land to a specified person, nearly always meant to give to him all that they had to give, Courts of Equity used to fasten upon any words indicative of an intention that more than a life estate should pass; and in this way the word "estate" came to be a recognized mode of describing the entire interest. But that, of course, is a different proposition from that advanced by Mr. Price, which is, that the words here used will not only pass the fee-simple (if the testator had it), but also any money charged upon the fee to which the testator was entitled. There is no reported case on the construction of wills in which the exact question raised here has been decided. If a testator was entitled to an estate for life, and, subject to an intermediate estate, to a remainder in fee, the devise of all his estate and interest would, no doubt, carry the life estate and the estate in remainder. But that, as I have said, is not the precise question here. In considering this point, some assistance, I think, may be derived from the analogy presented by the manner in which similar words are construed in settlements and other deeds.

Take the case of an all-the-estate clause in a deed. It is perfectly clear that unless there is something to restrict the operation of these general words, the words "all the estate and interest" would pass a charge such as the present. In Coke Littleton, 345 *b*, it is stated:—"'*Interest.*'—*Inter esse* is vulgarly taken for a terme or chattle reale, and more particularly for a future tearme; in which case it is said in pleading that he is possessed *de inter esse termini.* But *ex vi termini*, in legall understanding, it extendeth to estates, rights, and titles that a man hath of, in, or out of lands; for he is truly said to have an interest in them; and by the grant of *totum inter esse suum* in such lands, as well reversions as possessions in fee-simple shall passe; and all these words singularly spoken are *nomina collectiva*, for by the grant of *totum statum suum* in lands, all the estates therein passe." This shows that a wide construction should be given to the word "interest."

In *Drew* v. *Lord Norbury* (1) Lord St. Leonards says:—"Nothing could be more mischievous or contrary to law than to hold that when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance." Although these observations are pointed at a case where property was vested in a person in different characters, yet the reasons would seem to apply to a charge on a fee-simple estate, if the charge was one over which the grantor had disposing power. But the rule is laid down more generally by Lord Cranworth in *Johnson* v. *Webster* (2), where he says:—"*Prima facie*, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which he does not except. General words apt for that purpose are invariably used, and, I was told, occur in this settlement. I am therefore of opinion that there is nothing arising from the settlement which at all varies the case, and that the contingent interest in the legacy merged in the inheritance." The following passage occurs in Shep. Touch. 98:—"If a man be seised of land in fee-simple, or for life, and have an estate in it for years, by statute merchant, staple, elegit, or the like, and he grant all his estate, or all his right, or all his title, or all his interest of and in the land, all his estate and as much as he is able to grant doth pass."

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(1) 3 J. & L. 284.

(2) 4 D. M. & G. 484.

Is there any distinction in this respect between a deed and a will? If a wide construction is to be placed on such words in a deed, *a fortiori*, a wide construction should be placed on such words when they occur in a will. It makes no difference that the legatees are volunteers and not purchasers for value: since it seems clear that the testator here meant to part with all that which the words in question are capable of denoting. If, therefore, in the case of a deed for value, the estate clause is capable of including not only an estate (properly so called) in lands, but also, along with it, the testator's beneficial interest in money charged upon the same lands, I can see no valid reason why, in their context, the same words should not bear the same meaning in a will.

It appears to me, therefore, reading the will thus, that unless there are indications of a contrary intention, the words "all my estate and interest" cover everything which the testator had to dispose of in the lands, and that the phrase is equivalent to "all and every my estate," or "all my estate and every interest which I have in the lands."

Mr. FitzGibbon referred to *In re Clowes* (1), but the facts of that case were quite different from those of the present. Lindley, L.J., there does say:—"Money charged on land does not pass under a devise of land, and the attempt to get rid of that proposition, reading sections 23 and 24 of the Wills Act, and section 30 of the Conveyancing Act in a particular way, cannot, I think, succeed." That is so, no doubt, as a general rule: a gift of land might pass the legal estate in mortgaged lands, but not the beneficial interest in the mortgage debt. But the Lord Justice was not dealing with the words which occur here—"all my estate and interest." The question there was a different one. The testator was owner in fee of an estate, and devised it; five years afterwards he sold it, and took a mortgage of it for part of the purchase-money. He had therefore parted with the lands after he had made his will, and this would have amounted to an ademption of the devise, if there was nothing more. The mortgage debt was repaid to the executors of the testator shortly after his death. The person to whom the estate had been devised claimed that, as at the time of the death of the testator his only interest in the premises comprised in the devise was as mortgagee, the benefit of such mortgage passed to him under the devise. The Vice-Chancellor of the County Palatine of Lancaster held that he was entitled, but the Court of Appeal reversed that decision, holding that the testator had not, at the t[illegible]th, an estate or interest in the premises, and that the a[illegible] for the persons entitled to the mortgage money, inasmuch as [illegible]ourt of Equity mortgaged lands are always regarded as the property of the mortgagor, and, in the ordinary case of money lent on mortgage, are only a security to the mortgagee in case the mortgagor makes default; and if the covenant to pay the mortgage money is performed, there is no estate or interest, apart from the legal estate, in the mortgagee. That case, therefore, does not apply, and I am not bound to decide contrary to the ordinary meaning of the words before me. Besides, in *In re Clowes* (1), the premises were mortgaged or pledged to secure a debt; but in ordinary course they would not have had to be resorted to for payment of the debt, nor were they so resorted to in fact. In the present case the settlement fund is traced into the land, and there is nothing to take the place of the land; the mortgage charge is part of the estate, as it were, just as much as if the trust had attached upon some fields of the land itself. Therefore, I am of opinion that the words "all my estate and interest" passed not only the fee-simple of the lands, but also the mortgage. I have not gone into the question of the value of the lands and of the mortgage, but it would probably confirm my view of the legal aspect of the case.

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(1) [1893] 1 Ch. 214.

Solicitor for the plaintiff: *J. H. Mortimer.*
Solicitors for the defendants: *Stanuell & Son.*

W. L.

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(1) [1893] 1 Ch. 214.

V.-C.
1896.
July 9, 10.

SMITH *v.* WHITMORE.

(1894. No. 65.)

Lease—Covenant against alienation without consent in writing of landlord—Consent in letter of agent—Authority of agent—Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 *&* 24 *Vict. c.* 154), *s.* 10—*Married Woman—Sale of interest in leasehold—No deed acknowledged—Expiration of lease—Statutory tenancy—Graft—Circumstances disentitling to enforce equity.*

A lease contained a covenant that the lessee should not, without the express consent in writing of the landlord, assign the lands. By settlement on his marriage the lessee purported to assign them to trustees on certain trusts. Evidence was given that previous to the marriage the landlord's agent wrote a letter to the lessee, stating that the agent had got the landlord's consent to allow the place to be settled on the intended wife:—

Held, that section 10 of the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), applied; and that, as there was no consent testified as required by that section, the settlement was void.

In re Ulster Permanent Building Society and Junior Army and Navy Stores (13 L. R. Ir. 67) distinguished.

A married woman, entitled under her marriage settlement to an equitable life estate, in remainder expectant on her husband's death, in a leasehold for years, joined her husband, though not by deed acknowledged, in selling the lands. She took an active part in the sale and the application of the purchase-money, portion of which she herself received and retained. Her husband died in 1886. The lease expired in 1889; and in 1891, on the application of the purchaser's administratrix, who continued in possession, a fair rent was fixed. In 1894 the widow, alleging that the sale was void as against her, brought an action to have the statutory tenancy declared a graft on the leasehold interest, and subject to the trusts of the settlement. She made no offer to return the purchase-money:—

Held, that the widow was not, under the circumstances, entitled to enforce the equity claimed.

ACTION.

The statement of claim alleged:—By lease, dated the 22nd February, 1859, Viscount Powerscourt demised to Thomas Smith part of the lands of Ballyrory, in the county of Wexford, for thirty-one years, from the 25th March, 1858, at a rent of £150. By a settlement, dated the 20th November, 1863, and made on the marriage of the plaintiff with Thomas Smith, the latter assigned the lands to trustees, in trust for himself for life, with remainder for the plaintiff for life, with remainder, if there should be no child of the marriage (which event happened), for the executors or administrators of Thomas Smith, for the benefit of his next-of-kin at his death. Thomas Smith sold his interest in the lands to William Whitmore in July, 1884. No assignment was executed, but William Whitmore went into possession; he died in 1885. Thomas Smith died in February, 1886. The defendant, in February, 1888, as administratrix of William Whitmore, served an originating notice to have a fair rent fixed; and in August, 1891, an order was made by the Land Commission, fixing the fair rent at £140. One of the trustees was dead. The plaintiff claimed a declaration that the statutory tenancy under the fair rent order was a graft on the interest under the lease, and was subject to the trusts of the settlement, or, in the alternative, a declaration that she had established her title, as against the defendant, to an estate for life in the lands.

The defence stated:—The lease contained a covenant that the lessee, his executors, administrators, and assigns, should not, without the express consent or permission in writing of Viscount Powerscourt, his heirs or assigns, sell, assign, alien, sublet, or otherwise dispose of the demised lands and premises, or any part thereof, or in any manner part with the possession of same, or any part or parcel thereof, or bequeath the same by will to more than one child or other person, or divide same in any manner among his children or next-of-kin, or other persons. The landlord did not give his consent or permission in writing to the settlement. About the 1st July, 1884, Thomas Smith and the plaintiff caused the lands to be put up for sale by public auction, and William Whitmore became the purchaser for £900 and auction fees. He signed an agreement in writing, dated the 1st July, 1884, to purchase, and Thomas Smith and the plaintiff signed the same, and thereby agreed to the said sale. William Whitmore paid his purchase-money, and entered into possession. He died in April, 1885, and in August of that year letters of administration to his estate were granted to his widow, the defendant. She entered into possession, and on her application the fair rent was fixed.

The plaintiff replied that there was no contract or conveyance by the plaintiff by deed acknowledged, and also that the landlord did not consent to the sale to William Whitmore.

The following are the most material portions of the evidence:

The plaintiff deposed:—About three years before my marriage I knew of the lease to Thomas Smith. He had previously proposed marriage to me. I saw a letter from Mr. Kincaid, Lord Powerscourt's agent, to Thomas Smith. I am unable to find the letter. Mr. Kincaid said in it that he got Lord Powerscourt's consent to allow the place to be settled on me. I brought £1000 fortune. My husband afterwards got into difficulties, and fell into intemperate habits. I signed some document Mr. Warren gave me, without knowing what I was doing; no solicitor explained it to me. I never went to any solicitor or commissioner, or signed any document before them. My husband and I left the place, and William Whitmore went into possession. Cross-examined:—My husband was drinking at the time of the auction. About three years' rent were due. Lord Powerscourt threatened to evict unless the arrears were paid. Messrs. Little and Nunn, his agents, had probably written. The land was put up for sale. Portion of the purchase-money was applied in payment of the rent. Warren was the auctioneer. I don't remember telling him to sell. I wrote a letter forbidding him to do so. I did not want my name taken out of Lord Powerscourt's books. The auction was at the house. The reserve price was £1000. The biddings did not reach that sum. My husband objected to sell for less. I did not interfere. That is my signature; I signed the document, but I did not understand it. [This document, dated the 1st July, 1884, by which Thomas Smith and the plaintiff authorized Warren to sell is set out *infra*, p. 525.] That is also my signature; the document never was read for me; I did not know what it meant. [This was the agreement for sale at the end of the conditions, see *infra*, p. 526.] The purchase-money was paid to Warren. Portion of it was applied in payment of the rent, and of poor rates and county cess. That is my signature.

[Cheque dated the 4th October, 1884, for £50, drawn by Warren on account of the sale, payable to Thomas Smith, indorsed by him payable to the plaintiff, and indorsed by her.] The lands, crops, and all realized £984 7*s.* 3*d.* The balance was lodged in bank on deposit receipt in the joint names of my husband and myself; it might be £543 1*s.* 5*d.*; it was paid by cheque. That is my signature. [Auctioneer's ledger, with account of distribution of the purchase-money in payment of expenses, rent, rates, debts, &c., with an acknowledgment at foot of having received full particulars and vouchers, dated the 13th October, 1884, and signed by Thomas Smith and the plaintiff.] The money on deposit was drawn according as creditors called on my husband to pay. We drew out the money as it was wanted. About £100 now remains on deposit receipt. There is more than that owing. I did not bring the receipt; I won't tell where it is. There is only £100; no more that I could call my own. The bank manager has the receipt.

Thomas Charles, the surviving trustee of the settlement, deposed:—I saw the letter from Mr. Kincaid to Thomas Smith before the marriage was finally arranged. Thomas Smith showed it and read it to me. I saw Mr. Kincaid's signature. The letter was a consent to making the place over to Smith's wife. It was Mr. Kincaid's consent. After that the marriage was arranged, and the settlement made. I knew Mr. Kincaid: he was the agent over the property; I paid him rent for Lord Powerscourt.

George Warren:—I sold on the instructions of Thomas Smith and his wife. Both gave verbal instructions; both came into my office. I had several interviews with them at their house. The plaintiff was a consenting party to the sale. I entered into communication with Messrs. Little and Nunn, Lord Powerscourt's agents, in reference to the sale. I received the letter of the 30th June, 1884, from them. [See *infra*, p. 525.] The rent was, I believe, three years in arrear. All the letters I wrote were by orders of both Mr. and Mrs. Smith; the latter took an active part in the instructions; her name was in the advertisement; she did not object until the posters were up. There was no other objection, except the letter of the 17th June, 1884. [See *infra*, p. 524.] I wrote in answer on the 18th June. [See *infra*,

p. 525.] Mrs. Smith was with me several times after, but she made no further objection to her name being in the advertisement. I went to the farm on the 1st July; the auction was on the lands. Before the sale Mr. and Mrs. Smith signed a document authorizing the sale. She knew what she was doing; she made no objection to the sale, or to her name appearing as one of the vendors. The reserve price was understood to be £1000, but the bidding did not reach it. I then went into the room to consult Mr. and Mrs. Smith. Mr. Smith said he would not sell for less than £1200. Eventually he decided to let the place go for £1000. Mrs. Smith wanted him to take the bid as it was (£900), saying he would never get more. He would not. She pressed him very hard; spoke roughly to him; put her fist to his eyes, and said what she would do if he did not consent. He consented. I went out, and could not raise more, and the property was knocked down. The agreement was signed by William Whitmore and Mr. and Mrs. Smith; I read it to her before the sale, and she appeared to perfectly understand it. The chattels were sold another day. I disposed of the purchase-money on the instructions of Mr. and Mrs. Smith; the disbursements are in my ledger. I paid poor rates, county cess, and rent. I eventually closed the account by a cheque. There is an acknowledgment in my ledger signed by both. I believe I went to the bank with a cheque payable to myself, and lodged the amount in presence of both Mr. and Mrs. Smith. Mrs. Smith did not object; she seemed very well pleased. Cross-examined:—I thought it desirable to have Mrs. Smith's name in the sale, as she was the brains-carrier. I never heard she had an interest in the farm, or suspected it.

The letters of the 17th and 18th June, 1884, were as follows:

BALLYRORY FORT, BASNASTRAW,
WICKLOW GAP,
June 17*th*, 1884.

MR. GEORGE WARREN.

DEAR SIR,—I see my name in the advertisement of Ballyrory. I gave you no such orders, as I don't wish to have my name from under Lord Powerscourt. You may use Mr. Smith's name as you please.

Sincerely yours,
ELIZA SMITH.

AUCTION OFFICE, GORRY,
18*th June*, 1884.

MRS. SMITH, Ballyrory Fort.

DEAR MADAM,—Your favour of yesterday is duly received, and in reply I beg to say that I regret you are not pleased with your name appearing in the advertisement of the farm. I assure you I had it put in as a matter of courtesy and respect to you; and furthermore, it is right and proper that your name should appear in the advertisement, and that you should be a consenting party to the sale, and be consulted relative to every matter in connection with it.

I have communicated with Lord Powerscourt relative to your case, but up to the present I have not got a reply from him. With kind regards, I beg to remain

Yours very truly,
GEO. W. WARREN.

The letter of the 30th June, 1884, from Little and Nunn to Warren contained the following passage:—

"Mrs. Smith called on us to-day, and spoke of putting a reserve price of £1000 on the farm, and we pointed out to her the risk of losing the sale of the farm, as, if it is sold by the sheriff, they will lose everything. She appears to prefer that the farm should be sold, and we believe she is right, for we do not see how they can possibly continue to hold it."

The authority to sell was as follows:—

BALLYRORY FORT, WICKLOW GAP,
1*st July*, 1884.

We hereby authorise you to set up and sell by auction to the highest and best bidder, on this first day of July, 1884 (on the premises), all of our right, title, and interest in and to our farm and residence situate as above, and to hand over entire possession of the land and premises to the purchaser on or before the 15th day of August, next.

THOMAS SMITH.
ELIZA SMITH.

To MR. GEORGE W. WARREN,
Auctioneer.

Witness—JOHN MATHERS.

The particulars for the auction, so far as material, were as follows:—

To be sold by auction . . . at Ballyrory, . . . by directions of Mr. and Mrs. Smith, their right, title, and interest in and to their farm and residence situate as aforesaid. . . .

At the end of the conditions of sale was an agreement for purchase, which was signed by William Whitmore, and to which was appended the following:—

> As vendors, we agree to above sale and conditions.—THOMAS SMITH.
> ELIZA SMITH.

On the 22nd May, 1894, Lord Powerscourt signed an indorsement on this document, consenting to the agreement and sale.

Dunbar Barton, *Q.C.* (with him *Corvan*), for the plaintiff:—

The consent of the landlord to the settlement was given in the manner prescribed by the lease; there was therefore no assignment contrary to agreement, and no necessity for a consent testified in the mode required by section 10 of the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154): *In re Ulster Permanent Building Society and Junior Army and Navy Stores* (1). In the absence of anything to the contrary in the lease, the maxim *Qui facit per alium facit per se* applies, and the consent of the landlord conveyed by the agent in writing satisfies the covenant.

There is nothing fraudulent in a woman repudiating a contract made by her during coverture, and not acknowledged under the Fines and Recoveries Act (4 & 5 Wm. 4, c. 92). See *Cahill* v. *Cahill* (2) and the judgment there (p. 437) of Lord Blackburn.

Matheson, *Q.C.*, and *O'Connor*, *Q.C.* (with them *D. F. Browne*), for the defendant:—

The marriage settlement was void, and the plaintiff acquired no interest in the lands. To comply with the terms of the lease a consent in writing, under the hand of Lord Powerscourt himself, would have been necessary. Even if the consent could have been given through the agent, authority for that purpose should be proved. An ordinary agent has no power to give such consent; he cannot waive breaches of covenant: see *M'Grath* v. *Ahern* (3).

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(1) 13 L. R. Ir. 67.

(2) 8 App. Cas. 420, reversing the decisions below—*Cahill* v. *Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361.

(3) 20 L. R. Ir. 341.

Further, assuming the consent to have been given in the manner prescribed by the lease, and that the agent had authority, that would not have been sufficient, as the 10th section of the Act of 1860 was not complied with: *Butler* v. *Smith* (1) and the judgment there (p. 218) of Monahan, C.J.; see also *M'Grath* v. *Ahern* (2), and the judgment of Murphy, J. (p. 343), laying down that proof should have been given that the agent was authorized in writing, as required by section 10. *In re Ulster Permanent Building Society and Junior Army and Navy Stores* (3) was a case of vendor and purchaser, and does not go the length contended for. The evil intended to be provided for by the statute was the setting up of false consents; and in that case this danger did not arise, as the consent was indorsed on the lease itself and remained of record. There the lease prescribed the *mode* in which the consent was to be evidenced; and as the terms of the lease were complied with, the consent was held sufficient. The plaintiff here seeks to carry the decision much farther. If the lease in the present case merely prohibited assignment without the consent of the landlord, a parol consent—which, according to the plaintiff's contention, would be sufficient—could be set up, and might be sought to be established by the evidence of a witness deposing that over thirty years ago he heard the landlord say he had no objection to the settlement, and the evil intended to be guarded against would remain. There is a marked distinction between section 18 of the statute, which deals with subletting, and section 10. The former does not require the authority of the agent to be in writing, and it enables the consent to be testified by a note in writing. Section 10 is far more stringent.

Moreover, assuming the settlement to be valid, the lease expired in 1889, and the doctrine of graft could not apply to the new tenancy subsequently created by payment of rent, as the defendant stood in no fiduciary relation to the plaintiff. Further, though the plaintiff's estate in the lands could not pass without a deed acknowledged, and she might during the existence of the lease have repudiated the sale, now that the lease has expired and a new tenancy has been created she has no estate in the lands at law or in equity, the utmost she could be entitled to being a mere equity, the enforcement of which is by no means a matter of course. The plaintiff asks the Court to enforce this alleged equity, and to aid her to get back the land that she agreed to sell, a large portion of the purchase-money of which she herself received and some of which she still retains; after a new legal estate has been created in the purchaser; ten years after her coverture ceased, and her interest under the settlement became an estate in possession; after the defendant has with her knowledge undertaken a new liability for fifteen years under the fair rent order; when the parties cannot be restored to their original position; and this without even offering to pay back the purchase-money she received. The Court ought not to aid her to perpetrate such a fraud: *Cahill* v. *Cahill* (1) has no application to the facts here.

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(1) 16 Ir. C. L. R. 213. (2) 20 L. R. Ir. 341. (3) 13 L. R. Ir. 67.

Corvan, in reply:—

The plaintiff never gave instructions for the sale of her interest. Her letter of the 17th June, 1884, is a distinct repudiation of any such thing, and the auctioneer's reply is an assurance that her rights would not be affected by the sale. Section 10 of the Act of 1860 has no application, as the mode in which the consent was to be given is prescribed by the terms of the lease itself, and they have been complied with. The agent's letter stated that Lord Powerscourt had consented, and moreover, the consent indorsed on the conditions of sale is evidence of a consent to the settlement, as otherwise Thomas Smith would not have been in a position to sell. Further, the agent's consent would be sufficient: Maxwell on Statutes (3rd Ed.), 101, 102. See also *Reg.* (*Murphy*) v. *Justices of Donegal* (2).

It is contended that the plaintiff's conduct is fraudulent, but she could dispose of her interest only in the manner prescribed by the statute, and any attempt to bind it by any other means would be void. It is not a fraud to rely on an act being illegal. See, on the analogous case of restraint on anticipation by a married woman: *Stanley* v. *Stanley* (3). In the judgment of this Court in *Cahill* v. *Martin* (4) it is laid down (p. 246), "Contracts by married women with third parties, either with or without their husbands, when they are not dealing with their separate estate, are nullities. The law says that married women are not capable of so contracting or of dealing with their real estate except in a prescribed mode. The conscience of a married woman cannot, therefore, be affected by acts which are wholly void as to her." See also the judgment of Fitz Gibbon, L.J., in that case on appeal (1), and the judgment of Lord Blackburn in the House of Lords (2). The question of fraud does not affect the case. In *Butler* v. *Smith* (3) the agreement required a consent in writing, and that had not been given: that case has no application to the present.

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(1) 8 App. Cas. 420.
(2) 30 Ir. L. T. R. 6.
(3) 7 Ch. D. 589.
(4) 5 L. R. Ir. 227.

THE VICE-CHANCELLOR:—

The first question to be decided is whether the settlement of the 20th November, 1863, is valid. As between the parties to it, it would, of course, be so if there were anything to settle; but the subject of this deed is a lease containing a covenant under which the power to alien is made dependent on the landlord's consent. In the first place it was relied on for the defendant that there has not been a compliance with section 10 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, and it was contended that the case comes within that section. If the case is within the operation of that enactment the settlement must be void, as there has been no consent in writing of the landlord or his agent testified in manner thereby prescribed. The plaintiffs, in order to take the case out of the section, rely on the authority of *In re Ulster Permanent Building Society and Junior Army and Navy Stores* (4), before the Master of the Rolls; but in my opinion that case does not extend to the present, for there there was a specific provision in the lease that the lessee should not assign without the consent in writing of the landlord to be indorsed on the lease, whereas the 10th section requires the consent to be testified by the landlord being an executing party to the assignment, or by an indorsement on or subscription of the assignment. The Master of the Rolls came to the conclusion that the case was not regulated by section 10, and held that as there was an indorsement on the lease itself, which was the mode specified in the covenant, there was no assignment contrary to the agreement, and that the case was not within the section. Assuming that that decision was right, I do not think that it applies to this case. The ground of the decision was that an express mode of giving consent was prescribed by the lease, whereas here the requirements of the lease are stated only in general terms. I am disposed rather to give a strict interpretation to the section, and I am not prepared to extend the decision in the case referred to. I do not express any opinion that it is incorrect, but merely decide that it does not apply to such a case as the present where the consent required is indicated so generally. I cannot hold that section 10 does not apply, and if I were to dispose of the case on this point, I should hold the marriage settlement void.

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(1) 7 L. R. Ir. 361.

(2) *Cahill v. Cahill*, 8 App. Cas. 420.

(3) 16 Ir. C. L. R. 213.

(4) 13 L. R. Ir. 67.

But in another view of the case, and taking the terms of the lease itself, what proof is there of the consent required by it? The consent required by section 10 is that of the landlord or his agent thereto lawfully authorised in writing, but independently of that section it is necessary to consider whether an agent could give such a consent. That would involve the agent's having authority from the landlord. Here I should probably hold, if authority to give consent were proved, that the consent was sufficient; but proof of authority would be required. In general, the scope of authority of an agent would not include the power to give such consent: nothing of the kind is shown here, and I must say, that supposing the evidence on the subject to be true, there would be difficulty in holding that the consent deposed to would amount to such a consent as is required by the lease, for all the plaintiff said was that the letter stated that the agent had got Lord Powerscourt's consent to allow the place to be settled on her. Most objectionable persons might have been selected as trustees, and the vagueness and generality of the consent testified to would render it difficult to hold it a compliance with the terms of the lease: but I cannot decide that sufficient authority has been shown in the agent for the purpose.

But assuming that the landlord's consent was properly given, and that the settlement was valid, the thirty-one years term came to an end in 1889; the plaintiff's husband died in 1886, and thereupon her interest accrued. She lay by and never attempted to impeach the sale. Is she now in a position to establish the right she claims? That right is based on a purely equitable doctrine. Her interest would have been gone in 1889: a new estate was created, and in a person who purchased in 1884, and in that transaction the plaintiff took a most active part. She is a person of intelligence; her husband was addicted to drink, and unfit to take the principal part in the transaction of the sale; there was a heavy arrear of rent due, and the plaintiff and her husband agreed that their only chance of getting anything out of the land was by a sale, and they employed Mr. Warren as auctioneer, who describes the plaintiff as "the brains-carrier" in the transaction of the sale, and states that on the day of the auction she used the strongest pressure upon her husband to compel him to sell. Not only that, but she took an active part in the disposition of the purchase-money, and the £543 which remained after all claims had been discharged was deposited in the joint names of herself and her husband. How this sum was ultimately disposed of, it was impossible to get her to disclose, except that a considerable portion of it came to her own hands.

Under these circumstances the maxim that he who seeks equity must do equity applies. The plaintiff does not offer to give up any of this money, and it is inequitable for her now to ask assistance from this Court—not to enforce any legal or even existing equitable claim, but to declare that the tenancy now subsisting in the lands is a graft upon the former interest. I am not prepared to do that. Even supposing the settlement to be valid, the circumstances disentitle the plaintiff to enforce a mere equity against a purchaser.

On these grounds I must dismiss the action, and, in consequence of the unmeritorious way in which it comes before me, with costs.

Solicitor for the plaintiff: *Martin Huggard.*

Solicitors for the defendant: *P. J. O'Flaherty & Son.*

D. M'C. M.

M. R.
1896.

Jan. 22–24.
Feb. 6.

Appeal.
June 15.

REARDEN *v.* PROVINCIAL BANK OF IRELAND.

Company—Articles of association—Companies Act, 1862, *s.* 30—*Shares standing in name of trustee—Notice of equitable rights—Debt owing by trustee—Lien.*

B. was entitled, in her own right, to shares in a bank, of which she was the registered holder. In 1877 she married R., and by her marriage settlement purported to convey the shares to C and D, as trustees, upon usual trusts. After the marriage, C, as one of the trustees, wrote to the secretary of the bank, informing him of B.'s marriage, of the marriage settlement, and asking that the shares might be transferred into the joint names of the trustees. The secretary wrote in reply, pointing out that owing to the regulations of the bank the shares could not be transferred into joint names, and that the bank could not take notice of any trust. There was some correspondence on the subject.

In 1882 the bank was incorporated under the Companies Act of 1862. Clause 8 of the articles of association provided that no person should be recognized by the Company as holding any share upon any trust, and that the Company should not be bound by or recognize any equitable interest in any share, or any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder. Clause 11 provided that the Company should have a first and paramount lien and charge on all the shares registered in the name of a member (whether solely or jointly with others) for all moneys due to the Company from him, or his estate, either alone or jointly with any other person, whether a member or not, and whether such shares were presently payable or not.

After the incorporation of the Company (as it was then permissible) the shares were transferred into the joint names of the trustees, such transfer being made in 1885, after some further correspondence between the trustee C and the secretary of the bank. Both before and after incorporation the bank had notice that C and D were trustees in respect of the shares, that the shares had been put in settlement, and that neither of the trustees had any beneficial interest therein. From 1885 the dividends on the shares were paid to the husband R., as the nominee of the trustees, till his death in 1888. From that date till August, 1892, they were by arrangement paid to B. In 1891 D became indebted to the bank, and left the country in that year. C died in 1893. The bank claimed to hold the shares answerable for D's debt, and refused to pay any further dividends on the same till the debt was discharged:—

Held, by the Master of the Rolls and the Court of Appeal, that the bank were not entitled to a lien on the shares in respect of D's debt.

Per Porter, M.R.: The object of section 30 of the Companies Act of 1862, and of similar provisions in articles of association, is to spare a company the responsibility of attending to any trusts or equities whatever attached to their shares, so that they may safely deal with the person who is registered owner, recognizing no other person and no different right, and freeing them from inquiry into conflicting claims as to shares, transfers, calls, dividends, &c., and enabling them to treat the registered holder as owner of the shares for all purposes, without regard to contracts between himself and third persons. But it was not the object of the Legislature to enable a company to ignore, for their own purposes and interest, the rights of persons of which they have knowledge.

Per Palles, C.B.: The effect of the section is to relieve companies from liability arising, not from the joint operation of notice and an act or omission of the Company, but from notice *per se*; and not to extinguish or affect any obligation to which they would otherwise be subject by their own unconscientious conduct.

Trial of Action.

Prior to July, 1877, the plaintiff Mrs. Rearden (then Miss Beveridge), was entitled in her own right to six shares in the Provincial Bank of Ireland, and was then registered in the books of the bank as the holder and owner of these shares. On 17th July of that year she intermarried with James Thomas Rearden. At the time of her marriage a marriage settlement was executed. The parties to the settlement were James Thomas Rearden of the first part, the plaintiff, Mrs. Rearden, by her then name of Beveridge, of the second part, and John Francis Barry Beveridge and George Chapman Barry as trustees of the third part. The settlement purported to convey the six shares in the Provincial Bank to the trustees on usual trusts as regards personal property in a marriage settlement. At that time under the trusts of the deed of settlement of the Provincial Bank it was not allowable to have the shares vested in the names of more than one person; and clause 119 of the bank's deed of settlement provided as follows:—"In all cases where any share or shares in the capital of the society or co-partnership shall be assigned or bequeathed to or shall otherwise become vested in any person or persons, or shall be assigned or bequeathed to or otherwise become vested in any person or persons for any interest whether present or future.

not being an interest absolute and unincumbered, or any person or persons being an infant or infants for an interest absolute and unincumbered, or shall be charged or incumbered for the benefit of any person or persons, the receipt of the person who for the time being shall under the provisions herein contained be the proprietor of such share or shares shall, notwithstanding any claim or demand whatsoever of any person or persons entitled to the said share or shares or any interest therein, be a good and sufficient discharge for the money which may become payable from the society or co-partnership in respect of the said share or shares, and shall discharge the society or co-partnership and the other proprietors thereof from all obligation of seeing to its application, or from being answerable for its misapplication or non-application."

On 13th September, 1877, Mr. Beveridge (who was a brother of Mrs. Rearden), as one of the trustees of the marriage settlement, wrote to the secretary of the Provincial Bank informing him of the marriage of his sister to Mr. Rearden, and of the execution of the marriage settlement of 17th July, 1877, and informing him that he (Mr. Beveridge) and Mr. Barry were the trustees of that settlement, and asking that the six shares of the bank now vested in them as trustees should be transferred into the joint names of himself and Mr. Barry. The secretary of the bank wrote saying that before they could deal with the shares at all they must have a certified extract from the marriage registry as to the marriage, and that the transfer could only be made into the name of one individual, and that no notice could be taken of any trust. There was a correspondence in reference to the matter, the husband, Mr. Rearden, objecting to the transference of the shares into the name of one trustee, and the shares were for some time kept in abeyance, and carried to a suspense account, the dividends being paid to nobody.

On 31st May, 1882, an extraordinary general meeting of the society of the Provincial Bank was held, and a resolution was duly passed that the society assented to the registration of the society under the Companies Acts, 1862 to 1880, as a Company limited by shares, and the directors were thereby authorized and instructed to do all acts necessary to register the Company accordingly, and the said society was duly registered pursuant to the Acts on 10th

July, 1882, as a Company limited by shares. Clause 8 of the Articles of Association of the Company provided as follows:— "No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or (except only as by these presents otherwise provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder." And clause 11 provided: "The Company shall have a first and paramount lien and charge on all the shares registered in the name of a member (whether solely or jointly with others) for all moneys due to the company from him, or his estate, either alone or jointly with any other person, whether a member or not, and whether such shares are presently payable or not." Clause 27 provided as follows:— "The court of the directors may, in their discretion and without assigning any reason therefor, refuse to register the transfer of any share (not being a fully paid up share) to any person whom they shall not approve as transferee. The court of directors may also refuse to register any transfer of shares, whether fully paid up or not, on which the Company has a lien."

In October, 1882, the secretary of the bank wrote to Mr. Beveridge reminding him of the previous correspondence concerning the six £100 shares (which were then represented by twelve £100 shares), and of a transfer deed which had been sent to him by the bank for signature by the plaintiff, Mrs. Rearden, her husband, and himself, and which had not been returned, and stating that under the new regulations of the bank if these shares should not be transferred out of the wife's maiden name within three months after receiving notice they were liable to forfeiture. Further correspondence followed, and it was pointed out by the secretary that under the present constitution of the bank the shares could be transferred into the joint names of the trustees. Accordingly a regular deed of transfer, dated 17th February, 1885, was executed by Mr. Rearden and his wife transferring the shares into the names of the trustees, Mr. Beveridge and Mr. Barry, and the transfer was duly registered in the books of the Company. The dividends were then paid to Mr.

Rearden, the bank dealing with him as the nominee of the trustees, and on their direction paying the dividends to him. Some further correspondence took place as to the transmission of subsequent dividends, but the dividends were as a fact paid to Mr. Rearden during his life. He died on 14th September, 1888. After his death the dividends due on the shares were paid to the plaintiff Mrs. Rearden, down to August, 1892.

On the 21st February, 1891, Mr. Barry (one of the trustees of the marriage settlement) became indebted to the bank in the sum of £410 due upon a joint and several promissory note, dated the 21st February, 1891, made by Mr. Barry and two members of his family, and payable three months after date. £110 on foot of this note was paid in 1892, leaving a sum of £300 with interest due thereon. On the 21st February, 1893, the plaintiff Mrs. Rearden wrote to the secretary of the Provincial Bank in reference to dividends on certain other shares to which she was entitled, and also requesting payment of the February, 1893, dividend on the shares the subject of the action. On the 24th February following the secretary of the bank wrote in reply stating that with regard to the dividends on the shares in the joint names of Mr. Beveridge and Mr. Barry, he had to inform her that Mr. Barry was indebted to the bank, and until he had arranged for the payment of his debt no dividend could be paid on the shares, and no transfer of the shares could be permitted.

The correspondence in the case is fully referred to in the judgment of the Master of the Rolls.

Mr. Beveridge died on the 29th June, 1893. Mr. Barry left Ireland for America in October, 1891, where he continued to reside. The plaintiff John George M'Carthy sued as the present sole trustee of the marriage settlement of 1877.

In the statement of claim the plaintiffs prayed that it might be declared that the twelve shares in the Provincial Bank which had been transferred in the register of the bank on the 17th February, 1885, from the name of Nora Beveridge into the names of John Francis Barry Beveridge and George Chapman Barry, were at the date of such transfer, and now are subject to the trusts of the marriage settlement of the 17th July, 1877, and that the plaintiffs, according to their several estates and interests, are now entitled to hold the same, freed and discharged from all alleged lien or charge thereon of the Provincial Bank, in respect of moneys that may have been due, or that may be now due and owing from the said George Chapman Barry to the bank; and that the bank may be directed to transfer the said shares in their register from the names of John Francis Barry Beveridge and George Chapman Barry into the name of the plaintiff John George M'Carthy, to be held by him upon and subject to the trusts of the indenture of the 17th July, 1877.

Serjeant Jellett, Q.C. (with him *Teeling, Q.C.*, and *Linehan*), for the plaintiffs.

Prior to 1882 the constitution of the Provincial Bank was governed by their deed of settlement, and under those conditions the case of *Pinkett* v. *Wright* (1) was heard before Sir J. Wigram. The case is of great importance in this respect that the interpretation given by Lord Blackburn to clause 11 in the present articles of association (*Bradford Banking Company* v. *Briggs* (2) at page 33) represents what actually took place in *Pinkett* v. *Wright* (1). The articles have the same effect, he says, as if the holder of the shares had at the time he became such executed a covenant to the same effect. But he does not think it bound him any further. On the facts, the only distinction between *Pinkett* v. *Wright* (1), reported on appeal as *Murray* v. *Pinkett* (3), and the present, in principle, is that there was no evidence of notice in that case except the fact that Wright was a director. Here there are a series of letters from September, 1877 to 1880, all produced from the custody of the bank, establishing continuous notice of the most express and complete kind. It is idle to treat this notice as a nullity. Notwithstanding the Companies Act, 1862, and articles of association, notice of the existence of trusts and an equitable title is effectual, and takes shares out of the order and disposition of the bankrupt: *Ex parte Agra Bank* (4).

During the argument of *Murray* v. *Pinkett* (3) Lord Cottenham asks (p. 773) if there was any case in which the dealing of a trustee was held to affect the *cestui que trust*, and the answer is given that there was no case directly in point. In his judgment, p. 784, he says:—"If the grounds upon which the appellant has endeavoured to support his case were to be countenanced by this House, it appears to me that there would be a greater inroad made thereby on the security of property held in trust than by any decision which has been come to in any Court of Justice." Here there was complete knowledge on the part of the bank, and recognition by the bank of the existence of a trust and the nature of it. In this state of circumstances the bank, with knowledge that the trustee could not use the trust fund for his own benefit, but intending, if necessary, so to apply it, lend money to the trustee, and seek now to repay it out of a fund which they know belongs beneficially to another. This contention implies that the bank may consciously connive at or concur in a fraud. The provisions of the statutes or articles of settlement exempting them from recognizing trusts have no application to such a case. The observations of Lord Cottenham are strictly applicable to the present case and to the contention put forward by the bank. The principle laid down is as wide as can be, and applies to the dealings of trustees with trust property of any kind. The title of the bank here is purely equitable, the legal estate in the shares was either vested in the trustees of the settlement or in Mrs. Rearden or her husband. In *Pinkett* v. *Wright* (1) the title of each of the contending parties was equitable.

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(1) 2 Ha. 120.

(2) 12 App. Cas. 29.

(3) 12 Cl. & F. 764.

(4) L. R. 3 Ch. App. 555.

Such as were the rights and obligations between the shareholder and the bank prior to the 31st May, 1882, such they remained as between the Company and the beneficiaries after the incorporation. All the shares in question were original shares of the Company under its original constitution, and cannot be affected by an obligation which did not affect them at the time of their transfer to Miss Beveridge. Section 194 of the Companies Act, 1862, deals with the case of a person having rights against a Company before registration, and preserves those rights notwithstanding registration. It is clearly shown that the bank knew that neither Barry nor Beveridge had any beneficial interest in the shares whatsoever.

(1) 2 Ha. 120.

Looking at the case as it is affected by the Act of 1862, and the articles of association, how does the matter stand? The bank here insist that the notice of the trust which has been received by the Company is a nullity. The question depends on the construction of sect. 30 of the Act of 1862, and the 8th and 11th clauses of the articles of association. Take the construction of the 30th sect. of the Act of 1862 as compared with the 20th section of the Companies Clauses Act, 1845. As to the construction which has been put upon sections 22 to 30 of the Act of 1862, and sections 6 to 20 in the Act of 1845, see judgment of Lord Blackburn in *Bradford Banking Company* v. *Briggs* (1), and *The Directors of Shropshire Union Railways and Canal Company* v. *The Queen* (2), on the corresponding sections in the Companies Clauses Act. It is plain that all these sections in the two Acts were introduced for the protection of a Company, and to facilitate the transaction of their business. They must know whom they are to summon to meetings, who are responsible for calls, whose default is to involve forfeiture of shares, who are entitled to vote or give proxies at meetings of the Company, &c. For all these purposes they must have a representative shareholder. All the clauses are capable of a reasonable construction, and any construction must be resorted to rather than that which violates all law, and makes the property of one applicable to pay the debts of another: *Attorney-General* v. *Wilson* (3). Section 30 of the Companies Act has not the effect of preventing a Company being affected from the consequences of receiving notice. It does not prevent them being affected by notice in their trading capacity, but the object was to keep the register clear. They are not to be bound to investigate what are the equities attaching to the shares in their Company. What the Act requires is that in the conduct of their business the registered shareholder should represent the shares which stand in his name, and that the Company should not be involved in disputes between shareholders and third parties. The decision of *Bradford Banking Company* v. *Briggs* (1) is in accordance with this view.

(1) 12 App. Cas. 29, at pp. 37, 38.

(2) L. R. 7 H. L. Cas. 496.

(3) 31 L. R. Ir. 28, at p. 47.

M. R.
1896.

REARDEN
v.
PROVINCIAL
BANK.

So far as the claim of the Company rests on the 30th section of the Act of 1862 it is unsustainable. The articles of association in this case are merely expansions of the clauses in the original Act of settlement on the effect of which *Murray* v. *Pinkett* (1) was decided, and which Lord Cottenham said could not destroy the title of the *cestui que trust.*

[THE MASTER OF THE ROLLS: Is not the object of all these clauses to protect the Company against adverse claims, and not for the purpose of enabling them to close on property which does not belong to their debtors?]

Yes, that is our contention. On the other hand, put the contention of the bank into plain English, and what does it amount to. It is this: "Every trustee in whose name (as a trustee) shares shall be registered, and whether the bank have or have not notice of such trust, may borrow from the bank on the security of such shares any sum he may require for his own use." An Act of Parliament would be required to enable a Company to do this, but articles of association cannot introduce clauses in violation of the general principles of law: *Hope* v. *International Financial Society* (2). The construction sought to be put on the articles of association by the bank would, if right, render these articles void as being *ultra vires.*

In *New London and Brazilian Bank* v. *Broclebank* (3), there was no notice of a trust. This appears from the statement of Jessel, M.R., at p. 306; and see Buckley on Companies, p. 83. The decision in *Miles* v. *New Zealand Alford Estate Co.* (4) was founded on the decision of the Court of Appeal in *Bradford Banking Co.* v. *Briggs* (5), which was afterwards overruled. In *Perkins' Case* (6) the question was not whether the Company had a charge against the registered owner for a debt due by him, he being only a trustee, but whether they had it against the beneficial owner, who was the debtor, and who was not the registered owner (see Clause 20 of the Companies Clauses Act, 1845. And in that case *Bradford Banking Co.* v. *Briggs* (5) was not cited.

(1) 12 Cl. & Fin. 764.

(2) 4 Ch. Div. 327.

(3) 21 Ch. Div. 302.

(4) 32 Ch. Div. 266.

(5) 31 Ch. Div. 19; 12 App. Cas. 29.

(6) 24 Q. B. Div. 613.

In *Simpson* v. *Molsons' Bank* (1), there was a complicated trust, of which the bank had no notice: see pp. 279, 280. Neither in that case was the *Bradford Case* (2) cited.

The observations of Lord Selborne in *Société Générale de Paris* v. *Walker* (3), were extra judicial, and the other Lords repudiated Lord Selborne's propositions. On these grounds we submit that the plaintiffs are entitled to succeed.

The Solicitor-General (*Kenny, Q.C.*), *Meredith, Q.C.*, and *J. H. Moore*, for the defendants:—

The bank are entitled to a lien on the shares for Barry's debt. There was no effectual or sufficient notice. The letters which are alleged to constitute notice were written with the sole object of obtaining an answer to inquiries as to the formalities of transfer, and not for the purpose of fixing the bank with any obligation arising from notice. The notice, such as it was, was given in 1877, and kept up by a casual correspondence; it cannot affect the bank, which became a new Company in 1882. The trustee was directly informed that no notice could be taken of any trusts, and the bank were entitled to treat such notice as a nullity. Section 194 of the Companies Acts, 1862, does not bear the construction contended for by the plaintiffs. There was no authority cited in support of such a construction. After 1882 the rights and obligations of the Company and its shareholders were regulated by the articles of association on which the respective rights and liabilities depend. Each shareholder then held subject to the conditions contained in the articles of association. Section 30 of the Act of 1862, and clauses 8 and 11 of the articles of association must be read together, and these constituted the contract which each shareholder entered into with the bank, and each shareholder holds his shares, with all obligations attached to them, under this contract: *Werderman* v. *Société Générale d'Electricité* (4).

Such a contract is a legal one, and not *ultra vires*.

Miss Beveridge, at the date of the marriage settlement, must have known of the conditions attached to the shares, and she was bound by notice that these regulations could be altered from time to time. She assented to all the conditions. In such a contract there is nothing contrary to public policy. There is no question of any fraud. The shares are subject to an inherent infirmity that they are liable to lien for a debt due to the bank by the person in whose name they stand. The shares are put in settlement subject to that infirmity and obligation. The property is assigned, with all its incidents and liabilities. Even taking it that the information given as regards the trust was in the recollection of the officer of the bank at the date of the loan to Barry, still the bank were not bound to take notice of it, and they are in the same position as if they had received no notice or information as regards the trust whatever.

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(1) [1895] App. Cas. 270.
(2) 31 Ch. Div. 19; 12 App. Cas. 29.
(3) 11 App. Cas. 20.
(4) 19 Ch. Div. 246.

[THE MASTER OF THE ROLLS: Suppose Barry had gone to the bank and said: "I am only a trustee of these shares; but I want to pledge them for my own debt," would the bank be entitled to hold the shares as security for a loan to him made under such circumstances? and can they be in a better position if they knew the fact *aliunde*?]

The argument may be pushed to this that even if Barry, when borrowing the money, had said, "The shares in my name are not my property, and you are entitled to no lien on them for my debt," still from the very nature and quality of the shares themselves the bank would be entitled to a lien in respect of his debt. Nor would there be any injustice in this because the liability is inherent in the shares, and, when they were transferred to her, Miss Beveridge must have agreed to take them subject to the conditions on which they were held. That, however, is not the present case. It is not unreasonable to assume that the notice of the trust had passed out of the knowledge of the officers of the bank, and there is no evidence of any indebtedness of Barry prior to 1891. If such notice could be deemed effectual, there would be insuperable difficulty in a bank carrying on business. We ask the Court to come to the conclusion that the bank had not before their minds, at the time of the transaction with Barry, the fact that there was any trust attaching to the shares.

But the bank are not bound to take notice or keep any record for the purpose of showing the existence of any trust as regards shares standing in the name of a shareholder, and, no matter what notice is given, the bank are not bound to take any cognizance of it: *Simpson* v. *Molsons' Bank* (1); and see observations of Judges in Court of Appeal on this question in *Bradford Banking Company* v. *Briggs* (2), which are unaffected by the decision in the House of Lords. And once a Company is relieved from all necessity of inquiry into trusts, it is the same absolutely as if they had no notice whatever of them. They are enabled to say: "When we made an advance to a registered holder of shares, we obtained an immediate lien upon the shares standing in his name paramount to all equities between him and other parties." Under section 30 of the Companies Act, 1862, and clauses 8 and 11 of the articles of association, we are entitled to ask the Court to hold that no notice of trust can be given or received so as to affect the bank, and that the bank are at liberty to deal with AB and CD, who appear on the register, as if they were absolute owners. Both under the Act of Parliament and by contract we are entitled to maintain our position.

In *Société Générale de Paris* v. *Walker* (3), where there was a provision nearly identical with clause 8 of our articles of association, Lord Selborne says, "I think that according to the true and proper construction of the Companies Act of 1862 and of the articles of this Company, there was no obligation upon this Company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the Company with any trust; and if the Company is not affected by it, I do not see how the directors or officers of the Company individually can be"; and see the observations of Lindley, L. J., at the hearing in the Court of Appeal (4). No doubt some of the Law Lords, in *Bradford Banking Company* v. *Briggs* (5), disassociate themselves from this statement of Lord Selborne's in *Walker's Case* (3), but there is no expression of adverse opinion. The distinction between the present case and that of *Bradford Banking*

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(1) [1895] App. Cas. 270.

(2) 31 Ch. Div. 19.

(3) 11 App. Cas. 20.

(4) 14 Q. B. Div. 424, at p. 453.

(5) 12 App. Cas. 29.

Company v. *Briggs* (1), is that there was in the latter case no such clause as clause 8 of our articles of association. The contract was, therefore, different. That case only decides that section 30 of the Companies Act, 1862, is not sufficient to prevent a company being affected by notice. Even if there was no notice in *New London Brazilian Bank* v. *Broclebank* (2) the case is in our favour, on principle. And in *Re Perkins* (3) the Company had the fullest notice. The language of Lord Coleridge in that case is as strongly in favour of our contention as that of Lord Selborne in *Walker's Case* (4). At p. 616 he says: "It seems to me extremely important not to throw any doubt on the principle that Companies have nothing whatever to do with the relations between trustees and their *cestuis que trust*, in respect of the shares of the Company. If a trustee is on the Company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the Company have nothing whatever to do; they can only look to the man whose name is on the register." We also rely on *Miles* v. *New Zealand Alford Estate Company* (5), and *Simpson* v. *Molsons' Bank* (6).

Teeling, Q. C., in reply.

Feb. 6.

THE MASTER OF THE ROLLS (having referred to the pleadings said) :—

It is necessary that I should read the greater part of the correspondence because it is of vital importance in every way. The marriage took place in 1877. The first communication is dated 13th September, 1877, from Mr. Beveridge to the secretary of the bank. He says "Miss Nora Beveridge, holder of six shares in the Provincial Bank, was married on the 17th July last to Mr. James T. Rearden of Ballincurrig House, county Cork. Under her settlement these shares are vested in me and Mr. George Chapman Barry of Cork as trustees with power to pay over the dividends to Mr. Rearden during his life or permit him to receive them. It occurs to me the best course for the trustees would be, when you have registered the transfer to them, to grant a power of attorney to Mr. Rearden to receive the dividends. This would save the trouble of getting receipts signed on each occasion by both trustees; and Mr. Rearden has more time to look after the dividends than we have. Pray state whether you can arrange this, and whether you will require any other transfer deed than the settlement, the clauses of which appear to be ample."

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(1) 12 App. Cas. 29.
(2) 21 Ch. Div. 302.
(3) 24 Q. B. Div. 613.
(4) 11 App. Cas. 20.
(5) 32 Ch. Div. 266.
(6) [1895] App. Cas. 270.

That letter was, undoubtedly, written without any knowledge of the provisions of the Company's deed of settlement. The answer is written next day by the secretary of the bank, and is as follows:—"I have received your letter of the 13th instant, and have to say in reply that it is necessary that a certified extract from the marriage registry should be sent to this office as to the marriage of Miss Nora Beveridge who holds six £100 shares of this bank before any transfer of her shares can be made, which can only be done to the name of an individual, as according to the bank's deed of settlement no notice can be taken of trust or executory matters, neither can the shares of the bank stand in joint names. You can therefore consider what should be done to meet the requirements of the case in question." No doubt he was right as regards this. Clause 119 of the bank's deed of trust as it stood at that time provides:—"In all cases when any share or shares in the capital of the society or copartnership shall be assigned or bequeathed to or shall otherwise become vested in any persons or persons in trust for any other person or persons, or shall be assigned or bequeathed to or otherwise become vested in any person or persons for any interest whether present or future, not being an interest absolute and unincumbered, or any person or persons being an infant or infants for an interest absolute and unincumbered, or shall be charged or incumbered for the benefit of any person or persons, the receipt of the person who for the time being shall under the provisions herein contained be the proprietor of such share or shares shall, notwithstanding any claim or demand whatsoever of any person or persons entitled to the said share or shares or any interest therein, be a good and sufficient discharge for the money which may become payable from the society or copartnership in respect of the said share or shares, and shall discharge the society or copartnership and the other proprietors thereof from all obligation of seeing to its application or from being answerable for its misapplication or non-application." This trust deed did not contain any clause analogous to that clause in the articles of association which gives the Company a paramount lien and charge on all the shares registered in a member's name for moneys due by him. The secretary in this letter states that no notice can be taken of any trust attaching to shares, but he gives no notice to Mr. Beveridge that the bank would hold the shares answerable for the debt of any person into whose names they were transferred. Nor do I think it necessary that he should have done so.

There is then a long break in the correspondence. The next letter from Mr. Beveridge is dated 21st May, 1878, and is as follows:—" Referring to your letter of the 14th September as to the six shares standing in the name of Miss Nora Beveridge, but assigned under her settlement to me and Mr. G. C. Barry, I beg to send you certificate of the marriage obtained some time back, but lying by owing to a sudden sad domestic affliction. At time of marriage my sister signed her name ' Honoria ' as she believes that is the name given at time of her baptism, but her usual signature is ' Nora.' Some time back I informed Mr. Rearden of the difficulty you have regarding the shares being transferred to joint names. He agrees with me in thinking it inopportune to sell out the shares at their present low price, but as something must be done to get the dividends paid over to him I will thank you to inform me whether, in the event of my co-trustee consenting, your Board will allow of the shares being transferred to my name, as I am quite indifferent to any trouble that may devolve on me in the matter. If this cannot be done pray inform me what course I shall adopt to take over from the bank and transfer to Mr. Rearden in accordance with the trusts of the settlement the dividends which have accrued."

These letters are frank and fair letters, and I do not think it could enter into the mind of any one to suggest that in 1877 and 1878 the bank had not as complete notice as it was possible for them to get short of a decree of the Court of Chancery that Beveridge and Barry were trustees of a marriage settlement under which Mr. and Mrs. Rearden were beneficially interested, and that it was as trustees merely that Beveridge and Barry had any right; and, more than that, that it could make no difference, so far as the trustees and *cestuis que trust* were concerned, whether the shares were placed in the name of Beveridge and Barry or in the name of Beveridge alone, showing it was a pure trust transaction. That the bank had absolute and complete notice it is impossible to question. No doubt the notice might have been in a different form. If, instead of saying "Dear Sir," it had been "Sir, take notice," it might have been a more formal communication, but would not, in my opinion, have been one whit more efficacious to give complete and absolute notice that Beveridge and Barry had no beneficial interest in the shares.

The answer to that letter is dated 22nd May. The secretary writes: "I have your letter of yesterday's date, enclosing certificate of the marriage of Miss Nora, or Honoria Beveridge, in whose name there are standing six £100 shares of this bank; the Christmas, 1877, dividend warrant on which, amount £11 15*s*., is outstanding. These shares can be transferred into your own name, if you wish it, or into the name of any single individual; they cannot be transferred into joint names, nor to the name of a married lady. If they are to be transferred to your name, please supply us with your full name and description for insertion in the transfer deed. When the shares are thus transferred, and the transfer deed executed by all parties, the amount of the outstanding dividends will be paid to Mrs. Rearden and her husband, who must sign the warrant, but the future dividends will be payable to the transferee. We presume the transfer would be for a nominal consideration. As it is necessary your brother-in-law should be a party to the transfer deed, we will also require his address and description." He says: "These shares can be transferred into your own name if *you* wish it." What was the meaning of that? The shares stood at that time in the bank's books in the name of Honoria Beveridge. What was the meaning of saying to Mr. Beveridge, in whose name they did not stand, that he could have them in his name if he wished it? It shows that the bank knew perfectly well of the existence of some trusts, at any rate, and that the matter as regards the transfer deed rested with him, or with him and his co-trustee. And he says if they are to be transferred the dividends will be

M. R.
1896.
REARDEN
v.
PROVINCIAL
BANK.

paid to her and her husband. Why? Because there is a settlement; and they are told that it is a settlement, and who are entitled. And why does he "presume" the transfer is to be for a nominal consideration? Clearly because he knew that Beveridge and Barry were trustees of the settlement. That letter plainly shows that the secretary knew he was dealing with the trustees of the settlement, and frankly and fairly proceeds on that basis; and knowing perfectly well of the marriage settlement and the trusteeship he presumes that the transfer would be for nominal consideration. Then comes the important letter of June 24th, 1878, from Mr. Beveridge: "Since your letter of 22nd ult. I have been in communication with Mr. Rearden and Mr. Barry, my co-trustee, who approve of the six Provincial shares being transferred to my name. You will therefore kindly have transfer deed prepared." No one could suggest that this was to be a conveyance for value. He gives the names in full, and continues: "If you consider it necessary to make my co-trustee a party"—that is, to the transfer deed—"his description will be George Chapman Barry, etc. I take it the deed you require is entirely for the satisfaction of your Company; it will suit this case, though not as well as the form to be gone through in the National Bank, which will permit the shares to be transferred to both trustees and pay the dividends to one. As a matter of fact the six shares in your Company have passed to me and Mr. Barry for the objects of and under the registered settlement of which I have notified you, and I cannot consider Mr. Rearden's signature necessary, but I shall submit the deed to him for it. The consideration can be nominal, as you suggest." On 25th June, 1878, the secretary, Mr. Chambers, writes: "I have received your letter of yesterday's date. I note that the shares of this bank referred to are to be transferred into your name." He does not mean that this is entered on the register, but he has taken a note of it. "But we cannot do this until about the 15th proximo, as our books are closed up to that date. The necessary transfer deed will be sent for execution as soon after that date as possible. Your remarks on the manner in which the shares are transferred are noted, but they cannot be transferred in any other way, as stated to you in my letter of the 22nd ultimo. It is the way set forth in the deed of settlement of the bank, and of course must be complied with." The letter of 15th July encloses the transfer deed for execution, and that of the 6th September requests its execution and return to the office as soon as possible. And on 24th September Mr. Chambers writes: "Referring to my letters of the 15th July last and 6th inst., I beg to remind you that the deed transferring six £100 shares of this bank from name of Mrs. Rearden has not yet been returned to this office, nor has the amount of stamp and fee, namely, 16*s.*, been paid into our Dublin Office. Kindly give the matter your immediate attention." This 16*s.* has been alluded to in the course of the case, and it does seem to have a bearing upon it. Apparently it is a trivial matter, but it is of importance in one view as showing, in reference to the dealing with the shares, that the Head Office of the bank in London was not without information as to what went on in this country. They say: "You have not lodged 16*s.* in the office." They knew it, because, in the ordinary course of business, everything that went on in the Branch Offices must go to the Head Office in London.

On October 3rd, 1878, Mr. Beveridge writes: "In reply to your note of 24th ultimo, I beg to inform you that the position of Mrs. Rearden's shares shall receive my attention at the earliest moment. Other urgent matters have prevented me from disposing of this subject up to this." On 2nd December there is a letter from the secretary again asking for the return of the transfer deed executed, and a letter of February 19th, 1879, in which there is another reference to the fact that the transfer deed had not been signed and returned; showing that Mr. Chambers knew all that went on at the Dublin Branch. On 22nd February Beveridge writes: "I have to acknowledge the receipt of your letter of the 19th, which I have transmitted to Mr. Rearden. As he is the chief person at present interested, the dividends being payable to him, I should prefer not taking any steps without his concurrence. I have long since sent him all papers, but he has not favoured me with his views. As you say he should be a party to the transfer, I have sent him the form, which he has not returned. I fail to see what legal effect his signing it can have in view of the previous valid deed of settlement which assigns the shares in trust to me and Mr. Barry. In any case, however, I should prefer that the shares were not transferred to my name alone (to comply with your charter formally) without his distinct concurrence." Then comes the letter of February 28th, 1880, from Mr. Beveridge. The matter had dragged on. During all that time it cannot be suggested that the bank had not the fullest notice that they were dealing with trustees. Mr. Beveridge writes as follows: "Two years ago I wrote you regarding six shares in the Provincial Bank transferred to me and Mr. George Chapman Barry for trusts of the marriage settlement of my sister Honoria Beveridge with Mr. James Thomas Rearden. You required a form of transfer to be signed by Mr. and Mrs. Rearden, and that the transfer should be to one name only. The necessary papers were transmitted to Mr. Rearden, the chief person interested for the time, the dividends being his, and I understand he preferred to take no steps in the matter. I write you now to say that in the *Dublin Gazette* of this day the names of all shareholders in Irish banks appear, and I do not see the name of Miss Honoria Beveridge, my sister's maiden name, in which her six shares should be still standing as they have not been transferred to any one with my consent. Pray let me know whether there is an accidental omission in the *Gazette* or any list transmitted for insertion and oblige." The answer he got was this:—"I have received your letter of the 28th ulto. stating that your sister's maiden name, Miss Nora Beveridge, now Mrs. Rearden, did not appear as a shareholder of this bank in the *Dublin Gazette.* In explanation I have to say that it is the invariable practice of the bank when transfer of shares is applied for, and while the transfer deed is out to be executed to carry these shares to a suspense account, and this practice was pursued with regard to the transfer of your sister's shares to your name, the transfer deed of which has never been received back here, and I would suggest that you write to Mr. Rearden in whose hands it apparently is asking him to return it to this office executed or unexecuted. The fact of the shares therefore being in suspense account explains why your sister's name was not published as a shareholder." That is the last letter prior to the incorporation of the Company under the Companies Acts. At the date of the incorporation of the Company, and at the date of the passing of the special resolutions which were a necessary preliminary to the incorporation, Honoria Beveridge still appeared on the register as the owner and proprietor of the shares, but the Company not only had notice of the fact of her marriage, but had got in their possession a certified copy of her marriage certificate. They knew that the shares, for their purposes, vested in her husband, and that a transfer was intended to be made from her husband and herself to the trustees or one of them, and that a deed of transfer had been sent out and had not been returned, which had intimated to them that the shares were being dealt with. The shares were consequently carried to a suspense account, and there was no name of any person appearing in the list of shareholders as entitled to them. What was the consequence? In 1882, when these extraordinary meetings were being held, there was no one to receive notice of the meetings in respect of these shares; and it is not shown that James Thomas Rearden or Honoria Rearden or John Francis Barry Beveridge or George Chapman Barry, or any, or all of them, had any notice whatever, and probably it was not necessary that they should have such notice. It is probable that they had not any notice as there would be difficulty in saying that there was any shareholder in respect of these shares at the time. That may not have been important because the incorporation was completed and the articles of association were binding on every one; but, as regards giving any information of the change of *status*, it does not appear (further than they were bound by the general acts of the Company) that Mrs. Rearden was in any way herself personally brought into contact with the proposed changes.

After the incorporation of the Company the correspondence was resumed (the dividends not having been paid to any one from 1877 to 1882), and the letter of 20th October, 1882, from the secretary to Beveridge is as follows:—"You will, no doubt, remember a transfer deed of six £100 shares of this bank (£25 per share paid, now twelve £100 shares, £2 10*s*. per share paid) from Miss Nora Beveridge's (now Mrs. Rearden's) name to yourself was sent to you on the 15th July, 1878, for signature by Miss Beveridge, her husband, and yourself, and it has not been received back by us." Mr. Chambers knew this by looking at the letter-book of the bank, and had before his mind with freshness and distinctness every feature of the correspondence which had taken

M. R.
1896.

REARDEN
v.
PROVINCIAL
BANK.

place. He continues:—"Under the new regulations of the bank recently adopted by the shareholders, if these shares, which are now the property of Mr. Rearden are not transferred out of his wife's maiden name within three months after receiving notice to that effect from the bank they are liable to forfeiture. Before sending him such notice, however, I think it better to communicate with you." The answer of Beveridge is as follows:—"I have written to Mr. Rearden again in regard to the Provincial Bank shares the subject of your letter of the 20th inst. Should Mr. Rearden continue to decline to communicate with me on the subject I shall take advice of counsel as to my position as trustee in this matter." In June, 1883, the secretary writes:—"Referring to my letter of the 20th October last, and to your reply of the 27th, as to the shares of this bank standing in the name of Miss Nora Beveridge (now Mrs. Rearden) I shall be glad to hear whether you have come to an arrangement as to their being transferred," and he then writes again in September, 1883, to the same effect. On 29th September, 1883, Mr. Beveridge writes:—"In reply to your note of the 20th inst. I beg to inform you that I have received from Mrs. Rearden all the papers relating to the shares standing in her maiden name in the bank. Mr. Rearden still protests against being called on to sign another transfer in addition to that already embodied in the deed of settlement," that is the deed of settlement which you know about. "I have informed him that what your Company require is a mere legal formality and of no legal validity, as any interest my sister had in the shares became by the settlement vested in me and Mr. Barry, but I have been unable to influence him. I shall during the coming week have a case sent to Mr. Carton, and would be obliged by your informing me of the total amount of the dividends now accrued." On the 1st of October Chambers writes:—"I have received your letter of the 29th ulto. The amount of unpaid dividends on the shares (twelve £100) standing in the name of Miss Nora Beveridge (now Mrs. Rearden) is £120 15*s*. On referring to the Act (Companies Act) 25 & 26 Vic. cap. 89, sec. 30, you will see that the bank is forbidden to recognise trusts in any way, and what we therefore ask to have done is, as you rightly pointed out to Mr. Rearden, quite a legal formality." That is we don't mix the matter up with your marriage settlement, we take no notice of trusts, we are forbidden to do so; but the transfer to the trustees is "quite a legal formality."

On 7th February, 1885, Beveridge writes:—"Referring to correspondence of which I think the latest letter was yours of 18th October, 1883, in relation to the shares of my sister, Honoria Beveridge, now Mrs. Rearden, which were to be transferred to me and Mr. G. C. Barry, but could not be so transferred without the signature of Mr. Rearden, I am glad to say that my sister, writing yesterday, informs me that her husband no longer objects to sign the formal paper required by your bank. As the original shares have been subdivided I am to ask whether the transfer indenture sent by you on 15th July, 1878, and herewith returned will now suffice. I have heard that your bank no longer objects to shares being held in joint names. If this be so the transfer should be made out to me and Mr. George Chapman Barry as originally required." And so the shares were transferred, and the rest of the correspondence for some time deals with the payment of dividends upon these shares, there being some difficulty as regards the sending forward of the dividend-warrants.

Mr. Rearden died in 1888 and Mr. Beveridge in 1893, and then the bank received a letter from Mrs. Rearden asking about the dividends the transmission of which had been delayed. That letter was dated 21st February, 1893, to which came the answer of the 24th, which deals firstly with the dividends on shares not the subject of this action, and then continues thus:—"With regard to the dividends on the shares in the joint names of Mr. J. F. B. Beveridge and Mr. George C. Barry, I have to inform you that Mr. Barry is indebted to the bank, and until he has arranged for the payment of his debt no dividend can be paid on the shares, and no transfer of the shares can be permitted."

There the matter stands, so far as the correspondence goes, and that is the position the bank have taken up in reference to these shares. Their right to do that is the question involved in the present case.

The inferences of fact I deduce from the correspondence are as follows, viz.:—That the shares, which were transferred into the names of Beveridge and Barry after the bank had acquired power to allow a transfer into joint names, were transferred with complete knowledge on the part of the bank that these two gentlemen had no beneficial interest in them whatsoever, and were possessed of them merely as trustees of a marriage settlement. That is the conviction the correspondence carried home clearly to my mind at an early stage of the case. Then the question is whether the bank with that knowledge on their part are in a position to close on the shares and make them responsible for the debt of Barry.

There is another matter as regards which it would have been possible for the bank to have given full information, and in reference to which they have not given any, that is as regards their relations with Barry, how it came that at the date of the promissory note he was indebted to them in the sum of £410. The promissory note was dated 21st February 1891, but whether that note was given by him and his sureties to secure an old balance against him, or whether it was a new transaction originating at the time does not appear. I believe I am bound to take it as it stands, as a transaction of February, 1891. Another inference I draw from the complete silence of the bank is that Barry never purported directly to pledge these shares to them in any shape or form. They do not say that he did. There is no suggestion of the kind in the correspondence nor in the pleadings, and not only may I infer, but I am bound to infer, that he did not do so. Why? He was a mere trustee and had no beneficial interest; and if he was doing any act purporting to pledge the shares he was guilty of something very much worse than an ordinary breach of trust, for he was guilty of breach of trust under circumstances of dishonesty, amounting to personal fraud. It is not the duty of the Court, in absence of proof of actual fraud of that kind, to impute it to any one, and I see no evidence to induce me even to suspect that Barry was guilty of such dishonour. The Court has no right to attribute a fraudulent act to any one without evidence.

Again there is another matter which it was open to the bank to prove, if they could have proved it, viz., that the money was advanced by the bank in 1891 on the faith that he was the owner and proprietor of the shares. I do not know if this would have affected the case very much in its legal result, but it would have strengthened the argument of counsel for the defendants if they could have shown that the manager of the branch bank at Cork or Skibbereen who actually made the advance had done so after consulting the register of shareholders, and taking into consideration the fact that Barry was the owner of shares which by the articles of association were liable to lien for his debt. If that could have been shown it would have given greater force to the argument put forward that, even if Chambers and the directors must be assumed to have had knowledge of all these matters, it did not follow that the manager at Cork or Skibbereen knew of the transactions between Barry and the bank. And undoubtedly the advance made by the banker, if made in such a manner, and without knowledge or recollection of what had previously passed, would deprive the conduct of the bank of that air of intentional dishonesty which it is impossible to say does not hang round it. No such fact has been proved, and therefore I take it the case is presented in a mere, dry, legal aspect. The bank say, here are certain shares in Barry's name. Whether he is the owner or not does not matter. By the effect of the Companies Act of 1862, section 30, and by virtue of our own articles of association, and neglecting the knowledge given to us that he is merely a trustee for another, we are entitled to hold the shares answerable for his debt. That is the way the question of law arises.

In the case of *The New London and Brazilian Bank* v. *Broclebank* (1), the articles of association were substantially the same as here. But in that case, there was no notice even alleged by the Company of the absence of beneficial ownership on the part of the registered owners of the shares. The lien of the bank prevailed, and rightly; but the case has no authority or bearing on the point, when the clearest notice I have ever known (whatever the result of it may be) is proved.

Miles v. *New Zealand Alford Estate Co.* (2) was decided on the authority of *Bradford Bank* v. *Briggs*, in the Court of Appeal (3); but as the latter decision was reversed by the House of Lords, the former falls with it.

In *Simpson* v. *Molsons' Bank* (4), before the Judicial Com-

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(1) 21 Ch. D. 302.

(2) 32 Ch. D. 266.

(3) 31 Ch. D. 19.

(4) [1895] App. Cas. 270.

M. R.
1896.

REARDEN
v.
PROVINCIAL
BANK.

mittee, the facts bore little resemblance to those in the present case; but in deciding in favour of the claim of the Company for a lien upon shares, which were actually held in trust, the following important passage occurs in the judgment delivered by Lord Shand, p. 279:—"Apart from the provision of the statute, it may be that notice to the bank of the existence of a trust affecting the shares would have cast upon them the duty of ascertaining what were the terms of the trust; and that in any question with the beneficiaries, whose rights had been defeated by the absolute transfer in favour of Alexander Molson, the bank, whether they had inquired or not, might have been held to have constructive knowledge of all the trust provisions. Assuming this point in favour of the appellants, their Lordships, however, see no reason to doubt that by the clause in question the bank are relieved of the duty of making inquiry, and that they cannot be held responsible for registering the transfer, unless it was shown that they were at the time possessed of actual knowledge which made it improper for them to do so until at least they had taken care to give the beneficiaries an opportunity of protecting their rights. In the present case their Lordships are satisfied that at the date of the transfer the bank had not any notice which could warrant the inference that they were aware that a breach of trust was intended or was being committed." The persons who were legally the owners of the shares were executors, and one executor was a director of the bank which it was sought to affect with notice of trusts, and it was argued that there was constructive notice of the trusts sought to be enforced. It was held that the facts were not sufficient to affect the bank with the knowledge of the particular trusts, and, Lord Shand continuing says:—"What amount of knowledge would be sufficient to imply that the bank must know that a transfer is in breach of a trust is a question which must depend on the circumstances of each case." That judgment was the decision of the Judicial Committee of Privy Council in 1895.

This shows that in the opinion of the Judicial Committee the clauses and provisions in question did not put an end to all discussion as to the effect of notice; and it is to be observed that *Bradford Bank* v. *Briggs* (1) is not referred to at all in the case.

(1) 31 Ch. D. 19; 12 App. Cas. 29.

But the last-mentioned case, *Bradford Bank* v. *Briggs* (1), is the most important in reference to the case before me, and I shall notice it in some detail presently.

There have been in some of the cases very strong statements of the effect of the statutes and articles of association similar to those of the defendants here in reference to the utter invalidity of notices of trusts with which they have been sought to be affected. It is not necessary to recur to the earlier cases in which such observations have occurred. In two of the more recent decisions they are to be found, expressed as broadly as it is possible to find them anywhere.

In the *Société Générale de Paris* v. *Walker* (2), the high authority of Lord Selborne is committed to the following statement:—

"I think that, according to the true and proper construction of the Companies Act of 1862, and of the articles of this Company, there was no obligation upon this Company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the Company with any trust; and if the Company is not affected by it, I do not see how the directors or officers of the Company individually can be." That was a very strong statement made in reference to a clause of articles of association which is not distinguishable from that now before me.

It has to be borne in mind, however, that in the view that Lord Selborne and the other Law Lords took of that case, the dictum in question was unnecessary for its decision. The passage immediately preceding shows this: "The respondents not only had the certificates but they had the Company's undertaking under seal that there should be no change of the registered title unless those certificates were produced. What more could be necessary on any reasonable or intelligible principle, to 'perfect' their equitable title, which they were under no obligation to convert into a legal title by registration? If they had given any notice of the kind required in cases within the principle of *Dearle* v. *Hall* (3), to the Company, they would not thereby have constituted, between themselves and the Company, any such relation as, in cases of that class, is the effect of notice."

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(1) 31 Ch. D. 19; 12 App. Cas. 29. (2) 11 App. Cas. 20. (3) 3 Russ. 1.

M. R.
1896.
REARDEN
v.
PROVINCIAL
BANK.

Lord Blackburn does not notice the point at all, nor does Lord Watson; or Lord Halsbury. Lord FitzGerald does notice it; but only to show that he thought it did not arise; and he expressly guards himself from appearing to concur in the statement of Lord Selborne, if indeed he must not be taken to have dissented from its generality. He says at p. 44: "The opinion which I have thus formed renders it unnecessary for me to consider whether the notice alleged to have been given by the plaintiffs of their supposed equitable title to the Company was a sufficient notice, and, if it was, whether it was inoperative to affect the position of the parties by reason of the 30th section of the statute, or the 22nd of the Articles of Association. I assume the notice to have been sufficient in substance; and am of opinion that it was operative for some purposes; but on the very large and important question decided by the Court of Appeal, I do not feel it necessary to express any opinion. I entertain some doubt on the subject." And, therefore, in the next year when he says he expressly refrained from deciding the case on that ground, there is no doubt he is speaking with strict accuracy.

The question in *Société Générale de Paris* v. *Walker* (1) was not at all similar to that before me. An action had been brought against the Tramways Company (in which the shares in dispute were) as well as against Walker, the rival claimant to the shares, but had been stayed, as against the Company who had presumably no interest. There was no question of lien, such as is here; but merely a contest of priorities as between two equitable claimants to shares, the legal title to which was not in either of them. The question of notice to the Company arose incidentally in reference to the priorities of the claimants, not in regard to any claim or right of the Company itself; and even in that limited way was decided not to arise or to be material.

Further than that, in the case of the *Bradford Bank* v. *Briggs* (2), Lord Halsbury, Lord Blackburn, and Lord FitzGerald all took occasion to repudiate the notion that any such point had been decided in the case of the *Société Générale de Paris* v. *Walker*.

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(1) 11 App. Cas. 20.

(2) 12 App. Cas. 29.

Lord Halsbury says that he has read the judgment of Lord Blackburn in the case, and concurred in it; and that he would not have said anything further, except that he wished to guard himself against being taken to have decided the proposition which I have quoted from Lord Selborne's judgment, viz. that section 30 of the Companies Act renders it impossible (as the Solicitor-General and Mr. Meredith argued in the present case) for a Company to be affected by notice of any trust, expressed, implied, or constructive. "I was a party," he says, "to the judgment of your Lordships' House in the case to which reference is made, and I certainly never imagined myself to be agreeing to a decision which could establish any such proposition, and the noble and learned Lord," that is Lord Blackburn, "in whose words I have expressed my concurrence gave no such reasons for his judgment. No such proposition was necessary for the decision of the case, and I wish to guard myself on the present occasion from being supposed to have so held." In that case there was a question upon an article of association, but the case was also decided on section 30; and Lord Halsbury continues: "The words occur not only in the Companies Act, sect. 30, but also in sect. 83 of the Land Transfer Act, 1875; and if what is suggested as the true interpretation of those words were to be so determined by your Lordships' House, it would come to this, that whenever the conduct of the parties to a dealing in land had been such that a Court of Equity would imply a trust, the operation of those words would be such as to shield the person registering from the jurisdiction of a Court of Equity in respect of the lands so registered, though but for that section he would have been held by a Court of Equity to be merely a trustee. So startling a result ought not to be arrived at without direct decision, and as I have already said, I do not understand your Lordships ever to have decided it." And Lord Blackburn, referring to what Lord Selborne says in *Société Générale de Paris* v. *Walker* (1) remarks: "I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them, in their capacity

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(1) 11 App. Cas. 20.

M. R.
1896.
REARDEN
v.
PROVINCIAL
BANK.

of traders, with knowledge of their (the appellants') interest." And Lord FitzGerald says (p. 40): "Although my noble and learned friend has correctly quoted the opinion of Lord Selborne on the effect of sect. 30, yet it is observable that the other noble Lords who took part in the decision of the *Société Générale* v. *Walker* (1) expressly refrain from deciding the case on that ground, and I do not find that Lord Selborne expressed any opinion that the notice may not have been operative for other purposes." The learned Lord, as he says, expressly refrained from deciding the case on any such ground as that put by Lord Selborne, and looking back at his judgment in the case, it is plain that the current of his mind went the other way.

It is plain therefore that no such point was decided by the House of Lords, or deemed by its members to be involved in the decision of the case, and indeed it may be gathered that the opinion of the majority of the Lords who took part in determining *Société Générale de Paris* v. *Walker* (1) rather dissented than otherwise from Lord Selborne's view as reported.

The other recent case in which similar strong language is used (though these are not the only cases) is *Re Perkins; Ex parte Mexican Santa Barbara Mining Company* (2), which was decided by the Court of Appeal in 1890, more than three years after *The Bradford Bank* v. *Briggs* (3) in the House of Lords, though that case was not cited or referred to. Lord Coleridge, C. J., says, at page 616:—

"I am unable to agree with the Registrar's view upon two grounds. In the first place, it seems to me extremely important not to throw any doubt on the principle that Companies have nothing whatever to do with the relations between trustees and their *cestuis que trust* in respect of the shares of the Company. If a trustee is on the Company's register as the holder of shares, the relations which he may have with some other person in respect of the shares are matters with which the Company have nothing whatever to do; they can look only to the man whose name is upon the register. It seems to me that, if we were to throw any doubt upon that rule, we should make the carrying on of their business by joint stock Companies extremely difficult, and might involve those Companies in very serious questions, and the ultimate result would be anything but beneficial to the holders of shares in such Companies themselves." In that judgment it will be found that Lord Coleridge limits his observations to the case before him, viz. a case concerning the relations of shareholders with third persons, and not the relations of shareholders with the Company itself.

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(1) 11 App. Cas. 20. (2) 24 Q. B. D. 613. (3) 12 App. Cas. 29.

The question in Perkins' case did arise in reference to a question of lien by the Company: but oddly enough it arose by reason of an attempt to force upon the Company a lien which it disclaimed and repudiated.

The way the matter arose was this. Perkins commenced an action against Dickey and a Company, in which certain shares stood in the name of Dickey, claiming that he was equitably entitled to the shares standing in the name of Dickey, and as against Dickey he succeeded and got a decree declaring that he was a trustee, but the Company were dismissed out of the suit, and got their costs against the plaintiff—the action was dismissed as against the Company with costs. The judgment for these costs constituted the debt on foot of which the Company applied to have Perkins made bankrupt, on his not paying them. Their right to sustain the bankruptcy petition was disputed on the ground that there was no such debt due to the Company as to entitle them to make Perkins bankrupt, because he had been decided to be the equitable owner of the shares, and therefore, as equitable owner, the articles of association gave the Company a lien on that equitable interest in respect of the debt, and therefore they were secured creditors, and were not entitled to make him a bankrupt. That contention failed, and reading Lord Coleridge's language in that light, his observations appear to have little bearing on the case before me, and reading his language in the light of the subject-matter to which it was applied, there is little to be found fault with in it. He enunciates a general principle of importance, and one with which I for one have no intention of quarrelling. But if he meant to say that a Company by ignoring facts of which it is fully informed can acquire a right by subsequent transactions to property known to belong to a third person, then his language goes in my opinion farther than is necessary, and farther that the law warrants; and to that extent was not relevant to the case before the Court. The same remark is perhaps applicable to some of the language of Lord Esher in the same case (p. 618). But, as I have said, I do not think the words used bear this meaning. I think if I may respectfully say so, that the judgment of Fry, L. J., is free from any objection on the ground of undue or unnecessary generality, and does no more than state the law in its bearing on the very case before the Court (see pages 619, 620).

No doubt it does not follow that if the language of a judge goes further than is needed for the decision, it is therefore inaccurate. Is it then the case that any notice "if given to a Company would be absolutely inoperative to affect the Company with any trust"? In my opinion the case of *The Bradford Bank* v. *Briggs* (1) shows that this is not so, and that for some purposes, at any rate, notice may bind the Company, not with specific trusts, but with knowledge that shares are held by one who has no interest in them which he can lawfully deal with for his own benefit.

That case came originally before Field, J. The articles of association of a Company provided that the Company should have a first and permanent lien and charge on every share of every person who was the holder for all debts due by him to the Company. A shareholder deposited the certificates of some shares belonging to him in the Company with his bankers as security for the balance due, or which should become due, on his current account, and the bank gave notice to the Company of the deposit, the certificates deposited stating that the shares were held subject to the articles of association of the Company. It was held in the House of Lords, reversing the decision of the Court of Appeal, which had in turn reversed the decision of Field, J., that the Company could not, in respect of moneys which became due from the shareholder to the Company after notice of the deposit with the bank, claim priority over advances by the bank made after such notice, but that the principle of *Hopkinson* v. *Rolt* (2) applied.

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(1) 12 App. Cas. 29.

(2) 9 H. L. Cas. 514.

On this question of notice there are two important distinctions to be noted between the case of the Bradford Bank and the present. In that case there was no clause in the articles of association similar to clause 8 in the present. The question of notice there turned upon the effect of section 30 of the Act. Again, the equity affecting the shares there was that they had been deposited with a bank to secure advances, not as here, where they were held by a trustee.

Bearing these two points in mind, it is necessary to see exactly what was decided in *The Bradford Bank* v. *Briggs* (1). It is to be observed that there were three transactions—first, a lien by the Company; secondly, a mortgage by equitable deposit of the certificates of the shares by the shareholder for advances made by the bank; and, thirdly, further advances by them after notice to the Company; and the contest was as to whether the Company were enabled, notwithstanding notice of the intervening security, to draw up their subsequent advances and tack them to the previous advances. In the report of the case before Field, J., section 30 does not appear to have been referred to at all in either argument or judgment. Whatever the law had previously been, *Hopkinson* v. *Rolt* (2) overruled *Gordon* v. *Graham* (3), and decided that the principle no longer applied. He decided the case on the cases of *Hopkinson* v. *Rolt* and *Daun* v. *City of London Brewery Company* (4), and on a common sense view of the law, and was very clear in his opinion that there could not be a paramount lien in respect of one indivisible advance. He decided the case on mercantile and what may be called "City of London" grounds. In the Court of Appeal the question of notice was argued and dealt with in the judgments. Fry, L.J., says:—"That argument was substantially this, that the Company in the present case could not be affected by notice of the mortgages created by Easby & Fletcher with the bank. For that argument they rely on the 30th section of the Companies Act, 1862, under which the defendant Company was incorporated. That provides that 'no notice of any trust, expressed or implied or constructive, shall be entered on the register or be receivable by the registrar.' Now, it seems to me to be plain that the words 'shall be entered on the register' are not merely a direction with regard to the particular book in which notices are not to be entered, but that they imply that the Company is not to be affected with such notices, and for this reason, that the register is obviously the book upon which the notices ought to be entered if they are to be receivable by the Company at all. Therefore I am bound to say that I feel great difficulty in seeing how the notices could be given to the Company effectually for any purpose. Then it has been contended by the plaintiffs' counsel that the mortgages made by Easby and Fletcher to the bank were not trusts expressed, implied, or constructive. But I am unable to accede to that contention. It seems to me that as between Fletcher & Easby on the one hand, and the bank on the other, each security was a trust and nothing but a trust, and it appears to me that the effort on the part of the bank in the present case is to turn Briggs & Co. into constructive trustees by force and virtue of these notices, and I understand the effect of the enactment to be that no notice of any trust shall convert the Company into a constructive trustee, and, therefore, I think that these transactions were within the 30th section of the Act of 1862."

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(1) 12 App. Cas. 29.

(2) 9 H. L. Cas. 514.

(3) 2 Eq. Cas. Abr. 598.

(4) L. R. 8 Eq. 155.

Apart from the consequences flowing from this interpretation of section 30, I confess it seems to me difficult to regard it as otherwise than sound. Section 30 does not use the same words as are to be found in clause 8 of the articles of association; but in cases to which it applies, that is in cases of "any trust, expressed, implied, or constructive," the section prevents notice from being entered on the register; and it is hard to see what can be the object or meaning of that provision if it be not that which Fry, L.J., attributes to it. As to the meaning of the section, I do not find that the opinion of Fry, L.J., is questioned in the judgments of the House of Lords, though their lordships did not agree with him as to the results flowing from his interpretation. It seems to have been assumed, if not decided, that the effect of the 30th section was as wide as that of the clause in the articles of association in *Société Générale* *de Paris* v. *Walker* (1), and in that case the article in question was very similar to that before me. If this be so, the Bradford Banking Case becomes an authority applicable in that point of view to the present.

M. R.
1896.

REARDEN
v.
PROVINCIAL
BANK.

But taking this to be so, there remains another question as to the direct applicability of the Bradford Bank Case to the present. The Court of Appeal had held that that of which the bank had notice was a trust. Fry, L.J., says: "It seems to me that as between Fletcher and Easby on the one hand and the bank on the other, each security was a trust and nothing but a trust, and it appears to me that the effort on the part of the bank in the present case is to turn Briggs and Co. into constructive trustees by force and virtue of these notices."

On the other hand Lord Blackburn says, in the House of Lords (p. 38), "I think that in order to bring the case within the principle of *Hopkinson* v. *Rolt* (2), it is not necessary to establish any trust as against the Company. It is, I think, enough to show that the Company, *a trading one*, had by its agents who managed its trading transactions such knowledge that their customer Easby had *ceased to be the owner of the shares* as would have made it unjust to allow him credit on the faith of that property, which had once been his, but which he had parted with before they were asked to allow him to incur the debt for which they now seek priority. The Legislature are competent to enact that a trading Company of this sort should have the right to disregard the ordinary rules of justice and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the Company, but I do not think it possible to construe section 30 as an enactment to that effect. Lord Selborne in *Société Générale de Paris* v. *Walker* (1), said, 'I think that according to the true and proper construction of the Companies Act, 1862, and of the articles of the Company, there was no obligation upon this Company to accept, or to preserve any record of, notices of equitable interests or trusts if actually given or tendered to them, and that any such notice, if given, would be absolutely inoperative to affect the Company with any trust.' I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them, in their capacity of traders, with knowledge of their (the appellants') interest." Now in *Bradford Bank* v. *Briggs* (1) the transaction of which the bank had notice was this—the legal and equitable owner of shares had pledged them by depositing the share certificates with his bankers. He remained the legal owner after the deposit; but in equity the bank were the real owners subject to being redeemed at the option of the shareholder. The position of the bank was not disputed, that is, it was not denied that they were equitable mortgagees. The contest was between their equitable rights and the claims of the defendant Company to a lien for advances to the shareholder after and with actual notice of the bank's equitable mortgage.

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(1) 11 App. Cas. 20.

(2) 9 H. L. Cas. 514.

That such a transaction did for some purposes constitute the relation of trustee and *cestui que trust* between the bank and Easby could not I think be questioned. One person is legal owner. The other is the equitable owner (to the extent of his charge). If instead of a mortgage the transaction had been a sale, the certificates being deposited pending completion, it could not be doubted that the vendor would have held the legal title as a trustee for the purchaser so soon as the price was paid; and a mortgage is only a conditional sale.

But though undoubtedly for some purposes a trust, the condition or state of facts in *Bradford Banking Co.* v. *Briggs* (1), did not amount to a trust within the meaning of section 30, of the Act of 1862. Why is this?

The judgments in the House of Lords seem to say that the notice was not notice of a trust, in the sense of being notice of such a character as to attach to the Company the character of trustee. Section 30 deprives it of this character. It is not, therefore, the case of an attempt to affect the Company with a trust. It is merely notice that the person with whom the Company deals, that is the registered shareholder, is not really the owner of the shares. It does not enable the Company to "charge what they knew was one man's property with another man's debt if only that property consisted of shares in the Company."

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(1) 12 App. Cas. 29.

This is the decision of the House of Lords on the point. At first sight it is somewhat difficult—at least I have found it so—to grasp clearly the ground and reason of the conclusion. The justice of it is beyond cavil; but it may be conceded that it is hard to comprehend how exactly it is worked out in reference to the section 30, and to the fact that the relation (as in *Bradford Banking Company* v. *Briggs* (1)) between the shareholder and the bank, of which the bank had actual notice, was in ordinary legal language that of trustee and *cestui que trust*. It occurred to me during the argument, however, and I then threw it out, that the real object of the Legislature in enacting section 30, and that of similar provisions embodied in articles of association, may supply the key to the whole matter. It cannot be doubted that the intention was to spare the Company the responsibility of attending to any trusts or equities whatever attached to their shares, so that they might safely and securely deal with the person who is registered owner, and with him alone, recognising no other person and no different right; freeing them, in short, from all embarrassing inquiries into conflicting claims as to shares, transfers, calls, dividends, right to vote, and the like; and enabling them to treat the registered shareholder as owner of the shares for all purposes, without regard to contract as between himself and third persons. But it could never have been the object of the Legislature to enable the Company, say a trading Company like the Provincial Bank, to ignore for their own purposes and interests the rights of other persons of which they have actual knowledge, so as, in the words of Lord Blackburn, "to charge what they knew was one man's property with another man's debt." There is no obligation upon a bank or other Company to lend money on its shares, and no reason why any special protection should be afforded them if they do: or why, if they choose to do so, they should be exempt from the rules of law and justice.

I have not found that this view of sect. 30, or of articles of association similar to the present has been judicially laid down; but I am convinced it is sound. It is right and necessary that a Company should not be mixed up with outside claims and disputes. The Company is to have one person, or one set of persons alone, to deal with as shareholders; and it is to be unaffected by trusts, equities, and the like, which they have no means of determining or knowing anything about. In such cases, apart from sect. 30, and special articles of association, they really could not protect themselves. But this immunity can have no reason to support it when it is claimed that the Company may, for it's own benefit ignore facts within its own knowledge, as by creating liens in its own favour, contrary to good faith.

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(1) 12 App. Cas 29.

Sect. 30 provides "No notice of any trust, expressed or implied or constructive, shall be entered on the register, or be receivable by the registrar, in case of Companies under this Act, and registered in England or Ireland," and clause 8 of the articles of association provides, "No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be *bound* by, or recognise, any equitable, future, or partial interest in any share . . . or any other right in respect of any share except an absolute right to the entirety thereof in the registered holder." In both cases the language is, I think, intended for the protection of the Company; not to enable it to commit frauds, or knowingly take the benefit of them.

In the present case it is not sought (any more than in *Bradford Banking Company* v. *Briggs*) (1), to affect the bank with any particular trust, or with direct notice of any trust whatever. It is sought to show that no matter what trust or equity may have attached to the shares or to Barry, yet the bank had notice that Barry was not owner of the shares, and that they had this knowledge before they lent him the money in respect of which they claim to have a lien. I cannot see how in this point of view, the special facts of the present case render the reasoning in *Bradford Banking Company* v. *Briggs* (1) inapplicable.

But in the present case there is far more than mere notice to the Company of the rights of the plaintiff, or the absence of right and title in Barry. There is conduct on the part of the bank amounting to positive aquiescence in her position, or rather in the position that Barry had no property or right to the shares which he could use for his own benefit.

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(1) 12 App. Cas. 29.

M. R.
1896.

REARDEN
v.
PROVINCIAL
BANK.

The original notice to the bank was given at a time when neither sect. 30, nor clause 8 of the articles of association applied to it. The case of *Murray* v. *Pinkett* (1), was decided before that time in the absence of any clause analogous to that by which the bank assert lien under their present articles of association. It was held there that the lien claimed could not prevail; but as regards the effect of notice and clause 119 of the Bank's Charter, which I have read, the question was not debated and not decided. As to that, Lord Brougham says (p. 782), "It is a perfectly debateable point."

Before the incorporation of the Company the bank could not have asserted this case, and Serjeant Jellett relies on sect. 194 of the Companies Act, which provides, that "the registration in pursuance of this part of the Act of any Company shall not affect or prejudice the liability of such Company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, such Company previously to such registration," and says that is enough, that all the shares in question were original shares of the Company, and cannot consequently be affected by an obligation which did not exist at the time of the transfer to Miss Beveridge, which took place prior to the articles of association. I expressed an opinion during the argument that that section does not apply to the case, and I am clear that it does not. It is difficult to read the words so as to affect the particular transaction under consideration. Still the question is of great importance and nicety, and the argument put forward may turn out to be strictly right. My opinion is against it; but it is not necessary for my decision. Fortunately, the whole matter on this point of notice is evidenced by letters.

On 13th September, 1877, when *Murray* v. *Pinkett* (1) was in full force, the Company had express notice that Barry was merely a trustee of the marriage settlement, and though they say that no notice can be taken of trusts, they do, in fact take notice, in the clearest way, of the fact that Beveridge and Barry were trustees of the shares; and they do so continuously down till it suited their interest to close upon them for Barry's debt.

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(1) 12 Cl. & Fin. 764.

There was the fullest knowledge that Beveridge and Barry were mere trustees, to whom the shares had already been transferred by a deed, though not in their form. The transfer was for "nominal consideration," "a mere legal formality," the dividends were to be paid to Rearden; Rearden was dead, and it was "*therefore* necessary" to send the dividends to Mrs. Rearden (see letter of 18th September, 1888).

It is said to be a hard thing to hold that even if the secretary and directors in London had notice of the true state of facts, the manager of a local bank at Cork, or elsewhere, should be supposed to have like notice. The multiplicity of the transactions of a great bank (it is said) render it impossible to suppose that the local manager had such notice. The answer to that is, it is not proved as a fact that the local manager was ignorant; and even if he was, who is to suffer? How can any notice to bind the bank be given if not to the secretary acting for the bank? But I am sure that a local manager, before making an advance to be secured by lien on shares, would necessarily, and as a matter of duty, communicate with the head office to ascertain if the shares were still in the name of the customer and not transferred or otherwise dealt with. There could be no security whatever without this. And, indeed, in this case we have proof that the directors, in London, were informed by the local agents of the non-payment of the 16*s*. for stamps, as to which there is so much correspondence.

It is then proved that Barry was a mere trustee of the shares, and had no beneficial interest in them; that the bank knew this, and acted on that knowledge before they made any advance to Barry, or at least before they made any part of the advance now claimed by them as a lien. It is *not* proved that they, or any of their officers forgot these facts—the correspondence negatives this. It is not proved (and it lay on them to prove it), that they made the advance in question on the faith of Barry being the owner of the shares, or in the belief that any lien against him could be asserted. For all that appears, the claim of lien is a mere after-thought; an assertion of a right never contemplated when the loan was made, and not in any way connected with or conducing to its having been made. Above all, it is not proved that Barry ever, by word or in writing, professed to have any interest in these shares, or purported to deal with them in any way inconsistent with his duty as trustee. He is free from all fraud or dishonesty in the matter so far as appears. It is a question *strictissimi juris.* The bank say, "We are enforcing a claim against these shares to make them answerable for a debt owing to us by a man who was not their owner. We know Barry was a mere trustee. We always did know that. We must have known, and knew, that had he purported to pledge them to us for his own debt, he would have been committing a fraud of the grossest sort. But, then, sect. 30 of the Act, and clause 8 of our articles, combined with clause 11, enable us to do that thing. And, accordingly, since we are not bound to take notice of trusts, we will charge what we know is one man's property with the debt of another man." Indeed, the counsel for the bank did not flinch from pushing the argument to this, that even if when Barry got the loan he had told the bank—"Now, observe, the shares in my name are not mine, and you will have no lien on them," still they would have obtained the lien owing to the very intrinsic nature and quality of the shares themselves. And it was strongly pressed by Mr. Meredith, in his very powerful argument, that there is no injustice in what the bank are seeking to do, as the liability arises from the inherent infirmity in the nature of the shares, and Mrs. Rearden must be taken at the time of the transfer to her, to have known of and agreed to the terms on which they were held.

In my opinion the law does not afford any foundation for such a claim, and does not enable this injustice to be done. It would be a monstrous scandal and disgrace to our law if it did. The prayer of the plaintiffs must be granted with costs.

R. W. L.

Appeal.
June 8, 9, 10, 15.

The defendants appealed to the Court of Appeal (1).

Meredith, *Q.C.*, *O'Connor*, *Q.C.*, and *J. H. Moore*, for the appellants.

Serjeant Jellett, *Q.C.*, *Teeling*, *Q.C.*, and *Linehan*, for the respondent.

(1) Before Palles, C.B., and FitzGibbon and Walker, L.JJ.

Appeal.
1896.

Rearden
v.
Provincial
Bank.

June 15.

The Lord Chief Baron:—

This is a case to which an observation made by Lord Cottenham half a century ago, in a case against the same banking company, under its former constitution, is as applicable as, if indeed it is not more applicable than, it was to the case then under consideration. He said, "If the grounds upon which the appellant has endeavoured to support his case were to be countenanced by this House, it appears to me that there would be a greater inroad made thereby on the security of property held in trust than by any decision ever come to in any Court of Justice." The question there arose in reference to shares in a partnership constituted under the Bankers' Act, institutions which at that time were comparatively few, and for that reason the application of the principle there contended for would have been, to a certain extent, limited. But the question we have to decide here relates, not to one species of Company, but to all Companies under the Act of 1862; Companies which can be formed, without the authority of Parliament or the consent of the Crown, at the mere will of any seven persons. The value of the property invested in them is measured by thousands of millions; and the appellants' contention involves the principle, that our system of equitable jurisprudence, the growth of the wisdom of centuries, can be rendered inapplicable to the property invested in such Companies by the mere will of their promoters.

The question is whether the appellants, the Provincial Bank of Ireland, Limited, have a lien upon certain of their shares for a sum of £300 and interest, now due to them by one George Chapman Barry. The shares in question were, on the 17th February, 1885, duly transferred to, and registered in the names of, Mr. Barry and one John Francis Barry Beveridge. These gentlemen were trustees of a settlement dated 17th July, 1877, executed upon the marriage of James Thomas Rearden with Norah Beveridge, by which six shares in the defendants' bank, as then constituted, were assigned to them by Norah Beveridge, now Norah Rearden, upon certain trusts, under which, subject to a life interest in her, the shares were equitably vested in the children of the marriage. These children, with Mrs. Rearden, and the surviving trustee of the settlement, are the plaintiffs here.

The shares in question now represent, under the re-constitution of the bank, the six shares which were the subject of the settlement. The material clauses of the deed by which the bank was governed at the time they received notice of the settlement are not identical with those provisions of the articles of Association which have been relied upon during the argument. However, to simplify the case, and to free it from the consideration of questions which my view upon the principal matter for decision renders irrelevant, I assume, in favour of the bank, although in my mind it is open to grave doubt, that the rights of the plaintiffs are the same as they would have been had the settlement been executed after the re-constitution of the banking company.

Mr. Barry never had any beneficial interest in the shares; and I need hardly say that there is no clause in the settlement which either expressly or impliedly authorised either of the trustees to charge the trust estate with his own personal debt. It is undoubted that any act which purported to do so would have been a breach of trust, and an act of dishonesty.

The transfer of the 17th February, 1885, was in fact made to Mr. Beveridge and Mr. Barry as the trustees of this settlement; but, in consequence of the frame of the bank's articles of association, to which I shall hereafter refer, and the 30th section of the Companies Act, 1862, the trust could not, with propriety, have been, and therefore was not in fact, disclosed upon the transfer. It is, however, demonstrated by the correspondence, and expressly admitted by the counsel for the bank, that at the time of, and long prior to, the execution of the transfer, and thence continuously until, and at, the time when the bank allowed Mr. Barry to incur the debt in respect of which they now claim the lien, the bank had complete and actual knowledge that the shares were subject to the trusts of the settlement, and that Mr. Barry had neither beneficial interest therein, nor authority to pledge them for his own debt. Indeed the knowledge in the bank of the settlement and of its trusts was so complete that their Secretary in a letter to Mr. Beveridge of the 1st October, 1883, treated the execution of the transfer to the trustees, in the form in which it was afterwards executed, as merely "a legal formality."

The debt for which the lien is claimed was incurred on the

Appeal. 1896.

REARDEN *v.* PROVINCIAL BANK.

Palles, C.B.

21st February, 1891, by Mr. Barry joining two other persons in the execution of a joint and several promissory note to the bank for £400. Although it is not material to the decision here, I think it but justice to Mr. Barry to state that it is not pretended by the bank that he pledged, or attempted to pledge, the trust estate for this advance, or that he in any way availed hmself of his position as one of the shareholders of the bank to obtain it. The effort to withdraw the trust estate from the operation of the settlement, and to subject it to the debt of the trustee, is, so far as appears by the evidence, the act of the bank alone; and if that effort be against conscience, that want of conscience affects it only.

I need hardly say that the matters I have already stated throw upon the bank the *onus* of making some special affirmative case in support of their contention. That affirmative case they rest upon the 30th section of the Companies Act, 1862, and the 8th and 11th clauses of their articles of association.

It is admitted that the 30th section would not, *per se*, and irrespectively of the articles, or even in conjunction with clause 11 alone, have the effect contended for. Still, in the consideration of the effect of the articles, this section is so inextricably mixed up, that it is necessary to refer to it. It is in these words:—

> "No notice of any trust, express, implied, or constructive, shall be entered on the register, or receivable by the registrar."

"Register," in this section, means the book which, by section 25, is directed to be kept by the Company; and "Registrar" means the Registrar of Joint Stock Companies.

Clause 8 of the articles of association is cumbrous and prolix:—

> "No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or (except only as by these presents otherwise provided) any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder."

The last clause of the articles relied upon by the appellants is clause 11. It provides that—

> "The Company shall have a first and paramount lien and charge on all the shares registered in the name of a member, whether solely or jointly with

others, for all moneys due to the Company from him or his estate, either alone or jointly with any other person, whether a member or not, and whether such moneys are presently payable or not."

The contention of the appellants is that the joint effect of these three provisions is, that Mrs. Rearden (then Norah Beveridge), by becoming a shareholder in the Company, authorised it to give credit, to the full amount of the value of her shares, to any person in whose name such shares might thereafter be registered, as if such person were their absolute owner, and to advance money upon the security of such shares, although the Company, at the time of such advance, had actual knowledge that such shares were subject to trusts under which the registered owner had no beneficial interest, and under which the advance of money to him by the bank, upon the security of the shares, would be a breach of trust.

To support a decision for the appellants upon this contention, we must affirm two propositions: (1) that this is the true construction of these clauses of the articles, taken in connection with the section relied on; (2) that if so, the stipulation they contain as to lien is valid in law.

I entertain a strong opinion against the appellants upon each of these propositions. I am of opinion that the construction contended for is not the true one; and I am further of opinion that if such were the true construction, and if the articles in question were in the very words by which I have indicated the appellants' contention, the stipulation to that effect contained in the articles would be inoperative and void.

First, as regards the construction of section 30 of the Act of 1862. It appears to me that the immunity from taking notice of trusts thereby conferred upon the Company is, by its very words, limited to the Company acting in the discharge of its statutable duty in relation to the register, such as its duty to register transfers when presented to it in order. The case so much relied upon for the appellants, *The Société Générale de Paris* v. *Tramways Union Company* (1), was in relation to an act of this description; and therefore it is entirely unnecessary, for the purposes of this case, that we should consider which of the different views expressed by Lord Esher, Lord Justice Cotton, and Lord Justice

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(1) 14 Q. B. D. 424; 11 App. Cas. 20.

Lindley, as to the effect of notice of the trust upon the obligation to register the transfer, is the correct interpretation of the law. Nor need we determine whether the doubts expressed by Lord Halsbury and Lord Fitz Gerald, in *The Bradford Banking Company* v. *Briggs* (1), as to the *dictum* of Lord Selborne in the former case, are or are not well founded. Three expressions in the judgments in that former case have been much relied upon by the appellants, viz. the statement of Lord Esher (2), that the "Act of Parliament meant that the Company need not take notice in *any* way of trusts"; that of Lindley, L.J. (3), that "it is difficult to hold that the Companies are bound to pay *any* attention to notices of equitable trusts in shares"; and that of Lord Selborne, that "*any* such notice would be absolutely inoperative to affect the Company with any trust." The whole scope of the judgments in which these expressions occur shows that they must be read *secundum subjectam materiam*, viz., in relation to the obligation of the Company to register transfers. But, however this may be, *The Bradford Banking Company* v. *Briggs* (1), is an express decision of the House of Lords that this 30th section, and a clause similar to clause 11 of the articles here, taken together, do not bear the interpretation contended for by the appellants. The question there was as to a deposit of certificates of shares in the defendant Company, with the plaintiffs' bank as security for the balance due and to become due to the bank on the current account of the shareholder. The articles of association of the defendant Company provided, by a clause which went further than does clause 11 in the present case, "that the Company should have a first and paramount lien and charge, available at law and in equity, upon every share, for all debts due from the holder thereof." The decision was that the Company could not, under the above clause, claim in priority to the bank in respect of monies which became due from the shareholder to the Company after notice to the Company of the deposit of his share certificates with the bank.

The only matter which differentiates that case from the present is that there there was no clause in the articles of association similar to clause 8 here; and this brings me to consider the effect of that clause.

(1) 12 App. Cas. 29. (2) 14 Q. B. D. p. 439. (3) *Ibid.* p. 453.

The expression contained in it, "any equitable, contingent, future, or partial interest in any share, or any interest in any fractional part of a share, or any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder," is no more than a pleonasm for "trust." No such interest can exist otherwise than as a trust. Substituting this word "trust" for its cumbrous equivalent, the clause would read as follows:—"No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or recognise any trust," or, more simply, "no notice of any trust shall be recognised by, or shall bind, the Company." Thus, both the 30th section and the 8th clause relate to the same subject matter.

Now even assuming, that which I do not admit, that the clause here has a more extended operation than the section, that is, assuming the clause to apply to *all* transactions of the Company, whilst the section is limited to matters connected with the register, the effect of the clause and of the section, upon a transaction within them, would be identical. It is true that the section does not in express terms provide any protection for the Company; but when it expressly forbids it to recognise a trust, it impliedly protects it against liability for obeying the prohibition. Thus the clause, as to matters within it, does no more than provide expressly that which the section enacts impliedly, that the Company shall not be bound by a trust. Consequently when we know the effect of the section upon a matter within its scope, we also know the effect of the clause upon a matter within its scope, more extended though it may be.

I conceive that the liability intended to be provided against by the section was that which arose from the application to such Companies of the principle laid down by Sir Thomas Plumer, M.R., in *Dearle* v. *Hall* (1); and I entertain no doubt that this was the view of Lord Selborne in the *Société Générale de Paris* v. *Tramways Union Company* (2), although some of his words, if divorced from their subject-matter, may appear to bear a more extensive, and in my mind an erroneous, interpretation. Sir Thomas Plumer's words are as follows:—"Where a contract respecting property, in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach to the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of, that is, by giving notice of the contract to those in whom the legal interest is. By such notice *the legal holders are converted into trustees* for the new purchaser, and are charged with responsibility towards him."

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(1) 3 Russ. 1.

(2) 11 App. Cas. 20.

In applying this doctrine it is to be observed that although the legal interest in shares in a Company constituted under the Act is not vested in the Company itself, yet such Company, by reason of its duties in relation to the register, is a necessary party to every transfer of such legal interest, and but for the section in question it would possibly have been held by the application of the doctrine of *Dearle* v. *Hall* (1), that the Company was a trustee of its power of registration for persons having equitable interests of which it had notice, and, in my opinion, the object and effect of section 30 is to prevent such an obligation attaching to these Companies.

If this view be correct, the effect and operation of the section, and of clause No. 8 does not extend to extinguish or affect any obligation to which the Company would otherwise have been subject by reason of its own unconscientious conduct, although notice of the trust might be a material element in arriving at the conclusion that the conduct of the Company was against conscience. The mere fact of notice does not convert the Company into trustees for the persons of whose beneficial interest they have notice; but if, having that notice, they advance money to the trustee, on the security of the trust property, their conduct is not protected by the section and they participate in a breach of trust. So, too, they seek to commit a breach of trust by claiming, under colour of a lien created after such notice, to appropriate to the payment of their own debt property which to their knowledge is trust property. Property thus acquired they cannot be permitted to hold against the *cestui que trusts*. Once it is admitted that the effect of the clause and the section is the same as to matters to which they respectively apply, the principle of *The Bradford Banking Co.* v. *Briggs* (2) becomes directly applicable. That decision was founded, not (as possibly it might have been) upon the non-application of the 30th section to the case then before the House, but upon the principle that the relief there sought by the bank was not the enforcement of a trust. This *ratio decidendi* involved this, that the ground of the jurisdiction there was unconscientious conduct; and that, although the fact that the defendants had notice of the trust was a material fact in rendering their conduct unconscientious, they were not, by reason thereof, protected by the 30th section. Lord Halsbury there says:—"If what is suggested as the true interpretation" of the words of the 30th section "were to be so determined by your Lordships' House, it would come to this, that whenever the conduct of the parties to a dealing in land had been such that a Court of equity would imply a trust, the operation of those words would be such as to shield the person registering from the jurisdiction of a Court of equity in respect of the lands so registered, though but for that section he would have been held by a Court of equity to be merely a trustee. So startling a result ought not to be arrived at without direct decision; and, as I have already said, I do not understand your lordships ever to have decided it." He proceeds to say that he concurs in the conclusion at which Lord Blackburn had arrived, and in the reasons upon which it is founded. The ground upon which the latter decides the case is that, although the Legislature are competent to enact that a trading Company of this sort should have a right to disregard the ordinary rules of justice, and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the Company, section 30 could not be construed as an enactment to that effect; and that the appellants did not seek to affect the respondents with a trust, or to do more than to affect them, *in their capacity of traders*, with knowledge of the appellants' interest. Lord Fitz Gerald says:—"I cannot agree that the notice had no operation. It may not have affected the Company with any trust in favour of the pledgees, but it was a valid and operative intimation to the Company that the whole beneficial interest of the shareholder had been pledged to the bank."

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(1) 3 Russ. 1.

(2) 12 App. Cas. 29.

The *ratio decidendi*, therefore, was that although the 30th section was a provision negativing an obligation to take notice of the trust, it did not afford protection from a liability different in kind from the liability against which it was enacted that immunity should be afforded.

Some expressions in the judgments in the case so much relied on by the appellants: *The Société Générale de Paris* v. *Tramways Union Company* (1) go far beyond anything which it is necessary to decide here, as they point to notice of equitable rights being capable of imposing obligations upon the Company, even in its capacity of custodian of the register. For instance, Lord Justice Cotton says:—"In my opinion, when the Board have actual knowledge of circumstances which show a claim, though an equitable one, to shares, it would be their duty to refuse to register a transfer by the shareholder apparently in violation of the rights of which they have knowledge, until they have investigated the conflicting claims, or have given notice to the persons whose claims are apparently inconsistent with the proposed transfer. The Company are not bound to recognise trusts, and, in my opinion, cannot be made liable for accepting a transfer by any notice not to allow a transfer, or by any knowledge of the Board of facts inconsistent with his right to transfer. But here, as in most Companies, it is part of the duty of the Board to control the entries on the register. I do not say that the directors would, in all cases, be liable if they register a transfer inconsistent with an equitable claim of which they have received notice, or that they are bound to keep a register or record of such notices; but where they are asked to register a transfer which, *from circumstances in fact known to them at the time, would be in violation of the rights of others*, in my opinion, they cannot, either safely to themselves, or without disregard of their duty, register the transfer, at least without allowing time for inquiry, and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer."

Upon this question, however, as it does not arise in the present case, I decline to express any opinion.

These observations would be directly applicable to the present case if Mr. Barry, after the bank had notice of the settlement, had

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(1) 14 Q. B. D. 424; 11 App. Cas. 20.

Appeal.
1896.
REARDEN
v.
PROVINCIAL
BANK.
Palles, C.B.

re-transferred the shares to the Company, or to a trustee for them, for the purpose of realising their debt. In that case, which does not in substance differ from the present, the directors would have registered a transfer which, from circumstances known to them at the time, was in violation of the rights of the parties interested under the settlement; and it would have had this additional badge of fraud over and above what is pointed at in the case put by Lord Justice Cotton, that in the latter the act would have been one from which they did not derive advantage, whilst in the former, as in the present case, it would have been done for their own personal benefit.

Lord Justice Lindley says (1):—"I have no doubt that if directors allow a transferor to make a transfer which they know to be fraudulent, they could be made liable for the value of the shares transferred. They would make themselves parties to his fraud."

I need not say that a case also much relied upon, *The New London and Brazilian Bank* v. *Broclebank* (2) has no application whatsoever to the present. There the bank either had notice of the equitable rights, or it had not. If it had notice, the case is overruled by the decision in *The Bradford Banking Company* v. *Briggs* (3). If it had not, the case is not in point.

It might be sufficient if I rested my judgment on what I have already said; but I have to add that, in my opinion, the operation of clause 8 of the articles of associacion is, as is the 30th section, confined to acts of the Company in relation to its members as such; for instance, to such acts as are incapable of being performed by any person not a member, such as the execution of transfers, voting at meetings of the Company, and so forth. Although, to the knowledge of the Company, a member in whose name shares are registered has no beneficial interest in those shares, he has the legal interest, and what is required by the statute to constitute a member competent to vote and do all acts which the statute or articles authorise members to do, is the legal, not an equitable ownership.

The clause applies to all such acts; and, in my opinion, the origin of so much of this 8th clause as goes in words something further than section 30 of the Act of 1862, is to be found in the

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(1) 14 Q. B. Div. 453. (2) 21 Ch. D. 302. (3) 12 App. Cas. 29.

Appeal. 1896.

REARDEN *v.* PROVINCIAL BANK.

Palles, C.B.

judgment of Lord Westbury in *Ex parte Stewart* (1). I do not enter into the question whether that judgment is right or wrong. There is much authority for holding that his view is not now law; but I do no more than seek the origin of the clause, for the purpose of ascertaining its construction. Lord Westbury, in reference to an argument upon the 19th section of the Joint Stock Companies Act of 1856, which is identical with section 30 of the last Act, that it is not in the power of an equitable mortgagee to give any notice, because the Act of Parliament forbids the Company receiving it, says:—"That argument goes to destroy the power of a shareholder making any effectual equitable mortgage. But in point of fact the purpose of the enactment contained in this 19th section was simply this, that the title of the shareholders in the books of the Company should be kept wholly unencumbered and unaffected by any notices of equitable dealings"; and then he proceeds to state his reasons for that conclusion. Now, my view is that when it was ascertained by the authors of the precedent from which these articles of association have been adapted, that the words, "no notice of any trust shall be entered on the register, or receivable by the Registrar of Joint Stock Companies," were, in the view of Lord Westbury, insufficient to effect that which was there contended for, that they then provided that trusts should not only not be recognised by the Company, but that they should not bind them; thus providing in express terms immunity against the consequences of obedience to the former provision. But, in my opinion, the effect of the two expressions is identical; because, as has been pointed out by the judgments in the *Société Générale de Paris* v. *Tramways Union Company* (2), it is impossible to hold that a Company shall be prohibited from receiving notice, and at the same time shall not obtain immunity against responsibility arising from its simple receipt. In my view this clause does not apply to acts between the bank and its members of such a character as are capable of being transacted between the bank and a stranger, such as lending money on security, or, to use the words of Lord Blackburn, does not protect them in "their capacity as traders." In such a dealing the material matter, unless we are coerced to set aside all considerations of honesty, must be, not solely the legal but also the beneficial ownership, and this brings under consideration such beneficial interests in others as the Company at the time have knowledge of, and which render the legal owner incapable of honestly pledging the property as his own. These beneficial interests, in all matters to which the 8th clause applies, the bank is absolutely prohibited from inquiring into or recognising. If, then, its sphere of operation be extended to transactions between the Company, as a trader, and a person who happens to be a shareholder, but which transactions are of a class in which the Company might engage with the general public, as, for instance, lending money, clause 11 would amount to a license to the bank to participate, for its own benefit, in the fraudulent appropriation of the property of one person to the debt of another. I cannot think that the Court, unless coerced by the words so to do, ought, by adopting the construction contended for, attribute to the bank the iniquity of having introduced such a provision into its constitution. In my opinion, we are not so coerced, when the words, as I think these are, are capable of the other construction I have indicated, a construction at once reasonable and honest.

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(1) 4 De G. J. & S. 543.

(2) 14 Q. B. D. 424; 11 App. Cas. 20.

I therefore hold that this 8th clause applies to the Company *quâ* Company, in respect of matters arising between the Company and its members, as such; and that it has no application to acts of the Company in its trading character, such as lending money upon security. I hold that, as a lender of money, upon the security of its own shares, the Company is bound by the same equities as if it were advancing money upon the security of the shares of any other Company. I hold that clauses 8 and 11 of the articles of association are applicable to different subject matters; that clause 8 relates to acts between the Company and its members, as such; and that clause 11 relates to transactions of such a character as could be transacted between the bank and strangers; and further, that whatever be the application of the articles, they do not enable the Company to benefit by acts which if they did confer a benefit on them would amount to acts of fraud. For these reasons, I am of opinion that the appeal should be dismissed.

But, further, even if clause 8, upon its true construction, were general, and applied to matters within clause 11, I should be of opinion that, upon the general principles of law, the alleged lien of the appellants could not prevail against the plaintiffs, because, upon such a construction the clause would be immoral and illegal.

It is sufficient to suppose the contract to be put in the words which, *ex hypothesi*, are deemed to be its construction:—"The Company shall have a first and paramount lien and charge on all the shares registered in the name of a member, whether solely, or jointly with others, for all moneys due to the Company from him or his estate, alone or jointly with any other person, whether a member or not, and whether such moneys are presently payable or not, notwithstanding that, at the time of the advance of such moneys, the Company had knowledge that such member had no beneficial interest in, or right to charge, such shares."

If the clause had been that the lien would arise, not merely on the occurring of the debt, without any act by the member, but in the event of the member, in the circumstances indicated, charging the shares, the act of the member in so charging them would be a breach of trust; and if the bank, with notice of such breach of trust (which *ex hypothesi* they would have), insisted upon such charge against the equitable owners, they would be participators in that breach of trust, and, upon elementary principles, they could not obtain any benefit thereby; and the contract being that, in such event, they would obtain a benefit, it would unquestionably be illegal and void.

But the clause as supposed is even worse. It differs from that which I have last put, but in one respect only. The latter supposes an act of the member to be necessary to the creation of the charge, whereas the clause as supposed removes even the protection to the trust property of the honesty of the trustee, and provides that the lien shall attach automatically, without any act by the trustee. Indeed the charge could arise, although the trustee never had any money dealings with the bank. Suppose, for instance, he accepted the draft of a tradesman, and that the endorsee of the bill discounted it with the defendants' bank, then, although the bill were paid at maturity, the trust property, if the clause were valid, would have been attached during the period between its having been discounted and its maturity; and this without the trustee being a party to anything in the least degree improper.

There is another independent reason for which also I think it could be shown that the clause, had it the construction relied on, would be illegal, but into the details of which I think it unnecessary to enter, viz. that upon that construction it would be a restraint which the law would not tolerate upon the equitable owner's right of disposition of his property. It could, I think, be shown that *The Bradford Banking Company* v. *Briggs* (1), is an authority for that view; but, having arrived at a clear conclusion in favour of the respondents upon the grounds I have already stated at length, I do not think is necessary to encumber the case by this further consideration.

For these reasons, I am satisfied that the decree of the Master of the Rolls was in all respects right, and that the appeal should be dismissed with costs.

Fitz Gibbon, L. J.:—

I shall not dilute, condense, or repeat, the reasons which the Lord Chief Baron has so fully given for the decision in which I concur.

The general principle upon which my judgment rests is that, while Companies such as the Provincial Bank, Limited, may be protected by statute or by articles from having themselves or their capital affected by constructive trusts, or by equities, through notice given *in invitum*, or in matters in which they are not otherwise concerned, the clauses relied upon do not, upon their true construction, go further; such Companies remain liable, in respect of their own shares, to the same equitable jurisdiction over their business transactions, which affect all other property passing through their hands.

This jurisdiction operates upon conscience, for the enforcement of honest dealing in accordance with the rights of which the parties have actual knowledge at the time when they enter upon the transaction in question.

I can see no reason for exempting one limited class of parties,

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(1) 12 App. Cas. 29.

Appeal. 1896. REARDEN *v.* PROVINCIAL BANK. Fitz Gibbon, L.J.

with respect to one limited class of property, from a restraint upon fraud, which is typical of our equitable jurisdiction, and coeval with it.

In my opinion the affirmance of this principle is the foundation of the decision in *Briggs' Case* (1).

A clause equivalent to article XI. was there held not to have the effect contended for by the appellant bank, and if a clause purporting to confer a lien or charge on shares for the debt of a member has not that effect, when there is actual knowledge that the shares are not his beneficial property, neither sect. 30 of the Act of 1862, nor article VIII., can either have that effect *per se*, or extend the construction of article VIII.

These provisions are more germane to the constitution of the Company, and to the duty of keeping its register, than to any special power, right, or immunity, intended to be conferred upon a trading association in carrying on its business for profit.

The special circumstances of this case would make the opposite conclusion exceptionally unjust, because there was no conscious concurrence of the trustee shareholder in any pledging of the trust fund, and there was a continued acquiescence by the bank in the receipt of the dividends by the beneficiary Mrs. Rearden, which naturally threw her and her trustee entirely off their guard during a long period, at any point of which, if any risk of the present claim had been suspected, the trustee might have been changed, or might have transferred his account to another bank, or might have avoided incurring any liability to the Provincial Bank, or the investment might have been changed.

Lastly, we have here to deal with the rights of infants, a circumstance making it doubly impossible, if I may use such an expression, to support the claim of the bank on any basis of contract.

As the order appealed from omits any express finding of notice, we think it better to preface our affirmance with a declaration that it appears on the evidence that, at the time when the debts of George C. Barry were contracted, for which the bank now claims a lien upon the shares, the bank had notice and actual knowledge of the right of the plaintiffs to those shares under the marriage settlement.

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(1) 12 App. Cas. 29.

Appeal.
1896.

REARDEN
v.
PROVINCIAL
BANK.

WALKER, L.J.:—

I shall only add a few words, apologizing for what is really a needless addition to the judgments already delivered.

The claim of the Provincial Bank to apply the property of Mrs. Rearden and her children, knowing it to be such, to pay the debt of one of the two trustees of the settlement of the 17th July 1877, is based on the fact that the property is shares in their bank, and that their articles of association, and the 30th sect. of the Companies Act, 1862, enable them to make it against those who, having presumed knowledge of the articles, and of the 30th sect., subjected their shares to those obligations.

No one can complain of the bank asserting this right if they possess it. They are the best judges how far it will ultimately benefit them; but observations, as to the injustice that would follow from the existence of such a right, are perfectly legitimate and relevant in the consideration whether the articles are not consistent with another construction not opposed to the ordinary laws of property. The power which in this case the bankers assert is one not flowing from or necessarily connected with their position of an incorporated Company under the Act of 1862, which incorporation they owe to their own voluntary act. They assert a right of a banker against an indebted shareholder under a contract, and paragraph 11 might be struck out of the articles, and all the protection conferred by sect. 30, and article 8, whatever it be, would remain. We must consider, however, the effect of the articles separately and combined.

The appellants say that by reason of sect. 30, and the 8th article, the 11th must be read and interpreted in effect—"Whether we knew or not of equitable rights existing against the registered holder," and this contention renders it necessary to consider—1, whether the existence of sect. 30, and article 8, calls for such a construction, and, 2, whether such a construction is, in all events, the true one of that clause 11. So far as paragraph 8 of the articles expands or goes beyond sect. 30 of the Act of Parliament, it only rests in contract, but I think it merely expands in words what is embodied in the word "trust," and is still referable to the *status* to which sect. 30 refers, viz. the *status* of the registering authority, and the powers and duties entailed on it as such, and the inconveniences of having to deal with other than the registered incumbrancer, including the legal title to shares and all transmissions of that title, and I think it probable that the case of *New London and Brazilian Bank* v. *Broclebank* (1) (always assuming that there was in that case no proof of notice), and the case of *Ex parte Stewart* (2), and *Société-Générale de Paris* v. *Walker* (3), together contain the true limits of the rule.

Walker's Case (3) is an illustration of the true construction of sect 30. It was not a question of lien. It was a conflict between two outsiders—two equitable claimants to shares, and notice only became material in reference to their priorities *inter se*. The protection of the 30th section was very material to the Company, for the purpose of excluding the doctrine of *Dearle* v. *Hall* (4), and preventing the existence of such a person as an equitable shareholder, and this, I think, is all Lord Selborne intended to decide, by the general words he used. If he intended more, such view has been emphatically dissented from.

The decision, *In re Perkins* (5), is quite consistent with this. All it decided is, that the equitable owner of shares was not within a clause giving a lien against the "registered holder, or other the person for the time being entitled thereto against the Company," and there is in the Act, and all articles, a recognised class of such other persons.

The case of *The Bradford Banking Company* v. *Briggs* (6), seems to me to bear upon the two important questions which arise here—the construction of the 11th article, and also the effect on that of sect. 30, and the 8th article. That was a contest between a Company having a claim of lien against the registered holder of shares under its articles, and an equitable owner of the same shares under a right acquired, of which the Company got notice, which notice they alleged they were entitled to disregard. There, as here, the clause in the articles was wide enough to cover the lien claimed, but full effect was given to it only up to the time when the Company knew the property was not the shareholders', thus making the construction of the article harmonize with justice. Its apparently general and unlimited form was thus controlled.

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(1) 21 Ch. D. 302.
(2) 4 De G. J. & S. 543.
(3) 11 App. Cas. 20.
(4) 3 Russ. 1.
(5) 24 Q. B. D. 613.
(6) 12 App. Cas. 29.

The argument upon the effect of the 30th section, as bearing upon the articles, was met by the Law Lords, holding, that the equitable owners did not seek to affect the Company with notice of a trust (by that, I understand notice of a trust under sect. 30), but to bind the Company as traders by knowledge of his interest. This was not by putting any special limited construction on the 30th section by reason of the narrowness of the language, but by reason of, I think, its scope and object.

In one sense, every knowledge of an equitable right which binds, may be said to have the character of a trust. I think this case is, in principle, ruled by the decision in *Bradford Banking Company* v. *Briggs* (1). These clauses, too, are all affirmative clauses merely, and a legal title in a registered holder may well be consistent with the inability of the Company to aid in the commission of a fraud. The obligation which, according to the rules of equity, attaches on the conscience is not, even in terms, displaced by the clauses.

According to the appellants' argument, if Rearden had been the registered holder of these shares in 1877, and assigned them to trustees by his marriage settlement, of which the bank got a copy, they could, if he continued the registered holder, sell them for his debt incurred between July, 1882, and February, 1885.

There is not, I think, any decision or rule of law, or construction, which compels me so to hold. I do not think it necessary to express any opinion as to whether the notice given before 1882, prevented the Company affecting the rights of which they had notice by clauses in the articles, then for the first time framed.

Solicitors for the plaintiffs: *A. and J. Blake.*
Solicitor for the defendants: *Tweedy.*

R. D. M.

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(1) 12 App. Cas. 29.

M. R.
1896.
Feb. 5, 6.
March 3.

BARCROFT *v.* MURPHY.

(1894. No. 982.)

*Statute of Limitations—Mortgage—Non-payment of interest or acknowledgment—Action for recovery of land—" Present right to receive "—Tenant for life and remainderman—Power to give receipt—Trustees—*3 *&* 4 *Wm.* 4, *c.* 27, *ss.* 2, 24, 40—37 *&* 38 *Vict. c.* 57, *ss.* 1, 2, 8.

If interest is not paid on a mortgage for a period exceeding the statutory period to a person who is tenant for life of the estate of the mortgagee, this will not bar the remainderman. But the remainderman is barred by non-payment of interest for twelve years, if the mortgagee's estate is vested in trustees, with full powers of converting and realizing the mortgage debt, and with power of giving receipts, even though the trustees only hold the moneys, when realized, on trust to pay the interest to a tenant for life, and afterwards for the remainderman.

SPECIAL CASE.

By indenture dated 16th October, 1862, Samuel Murphy mortgaged to Andrew Lindsay certain lands situate in the county Down, some of which were freeholds held under fee-farm grants, and some leaseholds held under different terms of years, to secure the sum of £500 and interest at the rate of 5 per cent. per annum.

By indenture dated 17th July, 1871, the same premises (except a portion which had been released from the mortgage of 1862) were mortgaged by Samuel Murphy to Andrew Lindsay to secure a further sum of £350 and interest.

At the date of the last-mentioned indenture Alice Murphy, the mother of Samuel Murphy, was in possession of the premises comprised in the mortgage of 1862, or in receipt of the rents and profits thereof, and under an arrangement with him she duly paid the interest on this mortgage, and all accounts between her and the said Samuel Murphy were stated and settled on the 2nd day of August, 1871. By an agreement in writing dated the 2nd day of August, 1871, and made between Samuel Murphy of the one part, and Alice Murphy of the other part, Samuel Murphy agreed to let, and Alice Murphy agreed to take, as a tenant from year to year, portion of the mortgaged premises, subject to the payment of head rent, and the interest on the two mortgages to Andrew Lindsay. It was among other things agreed that the death of Alice Murphy should be deemed to be a determination of the tenancy. In pursuance of this agreement Alice Murphy entered into possession or receipt of the rents and profits of the said premises, and continued therein until about the year 1878. She paid all interest due to Andrew Lindsay up to the time of his death in 1874. On 9th October, 1873, Samuel Murphy executed his bond to Andrew Lindsay in the sum of £300, to secure £150 and interest, upon which judgment was subsequently marked.

Andrew Lindsay died on 6th July, 1874, having previously made his will dated 22nd November, 1865, the material part of which was as follows:—"I desire my trustees and executors hereinafter named, as soon as conveniently may be after my decease, to sell and convert into money such part of my personal estate (not including chattels real or household furniture, china, plate or household goods) as shall not consist of money or securities for money, and to call in and collect all contract debts due to me, and thereout to pay my just debts and funeral and testamentary expenses, and the surplus or residue to invest at interest upon solvent security; and I authorize and empower my said trustees and executors either to permit my outstanding special securities to remain as at present, or to call in and collect the same as in their discretion shall seem right, in which latter case I desire the amount of the said securities, together with the surplus or residue derived from the sale of my personal estate and simple contract debts, to be invested at interest upon good and solvent security or securities, and to pay the annual interest arising therefrom as same shall become payable to my sister Alice Murphy during the term of her natural life, to whom I bequeath such annual interest as aforesaid. I bequeath to my said sister Alice Murphy, all my real estate of every nature and kind during the term of her natural life, and upon the decease of the said Alice Murphy I give, devise, and bequeath all and singular my said real estate of every nature and kind, together with my said personal estate so invested as aforesaid unto my three nephews, John Murphy, Thomas Murphy, and

Joseph Murphy, children of my said sister Alice, and to their heirs, executors, administrators, and assigns absolutely." And the testator in the will declared as follows: "I desire that the receipt of my said trustees and executors shall be sufficient discharge to any person paying money to them pursuant to this my will; and as to any residue or remaining property, whether real or personal estate, I give, devise, and bequeath the same to my said nephews John, Thomas, and Joseph Murphy in equal shares as tenants in common." Testator appointed John Murphy, Joseph Murphy, and three other persons executors and trustees of his will. By codicil to his will the testator provided as follows: "The share of the property which I devised and bequeathed to my nephew Thomas Murphy, now deceased, I hereby devise and bequeath to my two nephews, John Murphy and Joseph Murphy, subject to the same conditions as directed in my said will."

Probate of the will and codicil was granted to John Murphy and Joseph Murphy alone on 7th December, 1874, none of the other three persons named as executors and trustees having ever acted or accepted the trusts of the will.

After the death of Andrew Lindsay his executors allowed Alice Murphy to enjoy his property during her life, pursuant to the provisions of his will.

By indenture dated 22nd April, 1875, Samuel Murphy conveyed the premises comprised in the mortgage of 17th July, 1871, to John Murphy and Joseph Murphy, by way of mortgage, to secure £400 and interest. The mortgage was made to them as trustees and executors of the will of Lindsay, and the sum of £400 was made up of £153 3*s.*, owing on the judgment previously stated, £100 lent by Andrew Lindsay in his lifetime to Samuel Murphy, and the sum of £146 17*s.* lent by John and Joseph Murphy to Samuel Murphy out of moneys in their hands subject to the trusts of the will.

The executors and trustees of the will of Lindsay never required Samuel Murphy to pay to them the interest on the mortgages, but knowing that Alice Murphy was in possession or receipt of the rents and profits of the mortgaged premises during Andrew Lindsay's lifetime, and at and after his death up to the year 1878, when the agreement of letting of 2nd August, 1871, was terminated, allowed her to account with herself for the interest on the mortgages as it became due.

Joseph Murphy died 9th December, 1876, and John Murphy died 7th January, 1882. The plaintiffs in the action were the executors and trustees of their respective wills.

Samuel Murphy died 10th March, 1887. Alice Murphy died 16th December, 1892. Alice Murphy did not, nor did the trustees and executors of Andrew Lindsay, John Murphy, or Joseph Murphy, or either of them, require Samuel Murphy to pay any interest on the mortgages after the year 1878, when the tenancy created by the agreement in writing dated 2nd August, 1871, was determined, and Samuel Murphy re-entered into possession of the premises demised to Alice Murphy by that agreement, and from that date no interest was in fact paid to any one on foot of the mortgages, or any of them, nor was any acknowledgment in writing ever given to any person.

By their writ of summons the plaintiffs claimed to have an account taken of what was due to them for principal and interest on three several indentures of mortgage dated respectively 16th October, 1862, 17th July, 1871, and 22nd April, 1875, and that in default of payment of the several sums so found due the said lands, now subject to the said three mortgages, might be sold, and that the costs of the action might be provided for. The defendants were sued as the devisees under the will of Samuel Murphy. By consent of the parties a special case was stated for the opinion of the Court.

R. F. Harrison (with him *Serjeant Jellett, Q.C.*) for the plaintiffs:—

The right of the plaintiffs to the mortgage debts only accrued on the death of Alice Murphy, and their rights cannot be affected by non-payment of interest to Alice Murphy. The question involved is whether if lands are mortgaged, and the interest of the mortgagees is settled and vested in trustees for a life tenant and a remainderman, non-payment of interest during the life tenancy for more than twelve years bars the remainderman.

There is no direct decision on the point. But the following propositions are settled :—

1. An action such as this to enforce payment out of lands, usually called a foreclosure action, is not dealt with by section 40 of 3 & 4 Wm. 4, c. 27, but by sections 2 and 24. It is an action to recover land, and is not within section 40 : *Wrixon* v. *Vize* (1) ; *Pugh* v. *Heath* (2). See also Lord Selborne's judgment in *Heath* v. *Pugh* (3); *Harlock* v. *Ashberry* (4). These sections only bar a right to the plaintiff or some person through whom he claims, while section 40 bars the right if there is a person capable of giving a discharge or release.

2. A mortgage of an interest reversionary in its character is only affected by the statute in relation to the time of bringing an action from the time of the interest becoming an interest in possession : *Hugill* v. *Wilkinson* (5); *Lowes' Settlement* (6); *Hancock* v. *Berrey* (7); *Lake's Trusts* (8); *Carroll* v. *Hargrave* (9). And even if the case is within section 40 the remedy is not barred unless there are trustees: *M'Carthy* v. *Daunt* (10).

3. The intervention of trustees in this case makes no difference. It is the title of the real owner not of the equitable owner that is to be considered : *Topham* v. *Booth* (11). Lewin on Trusts, 988. Darby and Bosanquet on Statutes of Limitation, 418 : *Scott* v. *Scott* (12).

4. That in this case the trustees are the same persons as the remaindermen makes no difference, as if a person fills two capacities an estoppel in one capacity will not be an estoppel in the other. See notes to *Duchess of Kingston's Case* (13).

On these grounds we submit the plaintiffs are entitled to succeed (14).

Gordon, Q.C. and *C. Murphy*, for the defendants :—

The mortgages are all barred and are no longer payable. We

(1) 3 Dr. & War. 104.
(2) 7 App. Cas. 235.
(3) 6 Q. B. D. 345.
(4) 19 Ch. D. 539.
(5) 38 Ch. D. 480.
(6) 30 Beav. 95.
(7) 57 L. J. Ch. (N. S.) 793.
(8) 63 L. T. (N. S.) 416.
(9) Ir. R. 5 Eq. 123.
(10) 11 Ir. Eq. R. 29.
(11) 35 Ch. D. 607.
(12) 4 H. L. Cas. 1065.
(13) 2 Sm. L. C. 740.
(14) See *Miller* v. *Collins*, [1896] 1 Ch. 573, since reported.

rely on section 40 of the Act of Wm. 4 as amended by the Act of 1874. This is not an action for the recovery of lands. The writ claims payment of the amount of the mortgage moneys, and according to the practice in this country the decree would be for payment and then in the alternative for sale: *Wrixon* v. *Vize* (1).

Under the provisions of the will of Andrew Lindsay, his executors and trustees had absolute power to call in the money or to sell the lands at their discretion. The estate in the lands was vested in them, and not in Alice Murphy. She had no right to make entry or bring a suit to recover the mortgage money. The right was in the trustees of the mortgagee. Time consequently began to run against them in 1878. At that date a "present right to receive" accrued to a person capable of giving a discharge: *Re Owen* (2). The *ratio decidendi* of *M'Carthy* v. *Daunt* (3) and *Carroll* v. *Hargrave* (4) was that there was not, in either case, any person capable of giving an effectual discharge. In *Topham* v. *Booth* (5) the hand to give and the hand to receive was practically the same. The words "present right to receive" are to be interpreted according to their ordinary meaning and acceptation in the English language: *Hornsey Local Board* v. *Monarch Investment Building Society* (6). In a case like this the *cestui que trust* is barred by time operating against his trustee. *Hovenden* v. *Lord Annesley* (7); *Pentland* v. *Stokes* (8); *Wych* v. *The East India Company* (9). Godefroi on Trusts, p. 715.

If the plaintiffs' argument is sound, any mortgagee, by putting the mortgage into settlement, could for generations prevent the statute running in favour of the mortgagor, and claims might be made after a long lapse of time, which would seriously affect the stability of property.

Serjeant Jellett, Q.C., in reply.

(1) 3 Dr. & War. 104.
(2) [1894] 3 Ch. 220.
(3) 11 Ir. Eq. R. 29.
(4) Ir. R. 5 Eq. 123.
(5) 35 Ch. D. 607.
(6) 24 Q. B. D. 1.
(7) 2 Sch. & Lef. 607.
(8) 2 B. & B. 68.
(9) 3 P. W. 309.

M. R.
1896.
BARCROFT
v.
MURPHY.
March 3.

THE MASTER OF THE ROLLS [after stating the facts] said :—

The precise point seems not to be covered by authority. The question is as to the application of the Statute of Limitations. The plaintiffs as executors and devisees in trust of Lindsay claim the money secured by the mortgages not as a debt now recoverable by way of personal liability. They admit that the personal remedy is barred by non-payment of interest, &c., since 1878. But they claim the benefit of the mortgages as against the lands in this way :—Alice Murphy was equitable tenant for life of part of the testator's estate including his specialty securities. She did not die till 1892, when the beneficial interest of John and Joseph Murphy became an interest in possession. Time only began to run against them in 1892, and the present proceeding is in time.

A number of separate and distinct questions are involved in this claim. There can be no doubt that the personal liability is barred (37 & 38 Vict. c. 57, s. 8). The executors of Lindsay were "capable of giving a discharge for it." But under sect. 1 (analogous to sect. 2 of 3 & 4 Wm. 4, c. 27) the right to "bring an action or suit to recover any land" remains till twelve years after the time at which the right to bring such action accrued to the plaintiff or "some person through whom he claims," and the plaintiffs here asserting that they are only remaindermen do not claim "through" the tenant for life who died in 1892. True, their legal title (they say) existed before as well as after 1892; but their beneficial interest was merely reversionary till then: and as the statutes apply to equitable as well as legal estates (3 & 4 Wm. 4, c. 27, s. 24, which is also perhaps supported by the mention of "suits" in sect. 2 of the Act of 1874) the plaintiffs' case is complete, if the present proceeding be one for the recovery of land. But it is a suit for the recovery of land, though the title of the plaintiff is only that of mortgagee (*Wrixon* v. *Vize* (1)). In form, mortgage suits in Ireland are brought not for foreclosure, but for foreclosure and sale, or sale alone, but there is, in reference to the Statute of Limitations, no distinction to be drawn on that ground. I so held in *Shea* v. *Moore* (2), and though the judgment in that case was reversed upon a different ground (one which does not arise in this case) this proposition seems to have been accepted by the Court of Appeal (see the judgment of the Lord Chancellor at p. 168 of the report), and I shall so hold till the contrary is decided by a higher tribunal.

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(1) 3 Dr. & War. 104.

(2) [1894] 1 Ir. R. 163.

Section 2 of the Act of 1874, assuming everything else in the case to be in the plaintiffs' favour, would give them six years from 1892, to bring this suit, although the tenant for life was previously barred. [His Lordship read the section.] Now is this reasoning sound? The groundwork of the whole of it is that the lands in question, the legal estate of which was in the mortgagee Lindsay, were by his will settled on Alice Murphy for life, with remainder to the plaintiffs, or those whom they represent. In my opinion this is a radical and fundamental error. No doubt the mortgage debt (to speak of all the mortgage debts in the singular number) was left to Alice Murphy for life; and no doubt the executors and trustees took the legal estate in the lands as a security for the entire debt, as well the life-interest in it of Alice Murphy as the interest in remainder. To that extent they were trustees of the lands for her benefit. But had she a life-estate in the lands? Upon this will I think it is perfectly clear that she had not. The executors and trustees had the entire estate in the land, with power to sell it or raise the money without her consent or even contrary to her wishes, "in their discretion." She could not have called upon them to convey to her a life-estate in the lands. Her right was to the money; and the trustees had power to perform their duty towards her to the full by getting rid of the mortgage altogether, and investing the money in the funds (for instance), whether she liked it or not. The money they must hold for her. The land she had no estate in whatever. Subject to the mortgage debt the lands were held by the mortgagees in trust for the mortgagor. In *M'Carthy* v. *Daunt* (1) the decision went largely on the absence of any power in the trustees to give a valid discharge for the amount of the charge. At p. 32 of the report, Jackson, J., says:—"It appears to us from the terms of this deed that the trustees were not enabled to give an effectual discharge, while the persons having the beneficial interest for life were in existence; their duty did not arise till after the death of the survivor of the tenants for life, and the trust does not come into operation as to the principal, until after the death of the tenants for life." And Moore, J., says (p. 33):—"Now in order to bring this charge within the operation of the 40th section of the 3 & 4 Wm. 4, c. 27, two things must be found concurring: there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge. These ingredients are wanting here. The charge was originally created by the deed of 1775. Mrs. M'Carthy, as one of the younger children, became entitled under an appointment made in 1793 to the greater portion of it. Except with her consent the sum could not be appointed to trustees. It was, however, appointed with her consent to trustees subject to her life-interest. The question is what were the actual rights of the trustees? Unless the Court is coerced by the positive words of the deed, it would not give it the construction which would have the effect of barring the rights of the unborn children. I think that the construction put upon the instrument by my brother Jackson is correct: viz. that this sum was to remain a charge on the land during the life of the tenant for life, and that there was no delegation to the trustees to receive it during her life; but that upon her death in 1845 the right to receive the money accrued to them, and not until then. It appears to me, therefore, that the trustees were not the hand to receive this money during the lifetime of the tenant for life, and that, therefore, the Statute of Limitations did not commence to run until the year 1845. In order to bring the case within the operation of that statute there must be a power in the person who is to receive the payment also to give an effectual release. It is well settled that a trustee, where there are *cestui que trusts*, is not capable of giving an effectual discharge without their concurrence, and it is the common practice in bills to bring both the trustee and the *cestui que trust* before the Court. There are many cases where, though the trustee is the person to give the receipt, yet the purchaser will be bound to look to the application of the purchase-money, and in such cases the purchaser cannot safely pay the money without the assent of the *cestui que trust*. Indeed one of the objects of the statute of 7 & 8 Vict. c. 76, already referred to by my brother Jackson, was to remedy that difficulty, and to allow the receipt of the trustee alone to be a sufficient discharge for the trust-money, unless the instrument defining the trust contained a provision against the sufficiency of it. In my mind that statute amounts to a clear legislative expression of what was before the settled principle of the Courts of Equity; namely, that the trustee, without the concurrence of the *cestui que trust*, could not give a valid discharge. I therefore concur with Jackson, J., and think that the plaintiff is not barred, provided the other question should be decided in her favour. A doubt, however, has been raised on the evidence as to whether the power to charge extended over that part of the land in the possession of the defendant; but we are all of opinion, that a ground for an inquiry has been established, and if it turn out (as my own impression on the evidence is, it will) that it is charged on these lands, the plaintiff, as one of the younger children would be entitled." Of course this is not a case exactly in point; but, I think, the principle affords some assistance in reference to the present case. In short, I think, that not only the right to bring an action or suit to recover the mortgage money but also the right to recover the land was in the mortgagee and his trustees and not in Alice Murphy.

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(1) 11 Ir. Eq. R. 29.

And if this would be so in an ordinary case, that is, in the simple case of trustees with power to sell and vary investments at their discretion, tenant for life, and remainderman, the argument is infinitely stronger when (as here) the trustees are themselves the beneficial owners, subject only to a life-interest in the money. It is they and they only who could foreclose the mortgage or sell the land or maintain ejectment in order to enter upon its possession. So long as Alice Murphy received her interest she had no right to interfere except in the case of a breach or threatened breach of trust. And indeed the contention of the plaintiffs is reduced almost *ad absurdum* when it has to be extended to include the case of the third mortgage, which was made not to their testator but to themselves after his death. In respect of this they contend that time did not begin to run against them till the death of Alice Murphy; and, no doubt, their argument as to the other mortgages necessarily leads to that result. But holding, as

I do, that that argument is founded upon a complete error, I am clearly of opinion that the Statute of Limitations is an answer to the action.

Solicitors for the plaintiffs: *Murland & Co.*
Solicitor for the defendants: *T. B. Wallace.*

R. W. L.

V.-C.
1896.
June 9.

In re BATTERSBY'S TRUSTS.

(1895. No. 761.)

Will—Construction—"Families"—Substitutionary gift.

Testator bequeathed his property to his wife for her life, and after her death "unto his brothers and sisters in equal shares and proportions, or unto the families of such of them as shall be then dead." All his brothers and sisters died in the lifetime of testator's widow, leaving sons and daughters and also grandchildren:—

Held, (1) that "families" did not include grandchildren; (2) that the sons and daughters of testator's brothers and sisters took *per stirpes*; (3) that the words "in equal shares" applied only to the gift to testator's brothers and sisters, and could not be extended to the substitutionary gifts, and that therefore the children of each brother and sister took as joint tenants *inter se*.

Requisition from the Chief Clerk to determine questions arising on the will of Thomas Battersby dated the 26th July, 1839. The testator died on the 17th March, 1847, and probate of his said will was on the 16th November, 1848, granted to his widow as sole executrix. By his said will testator devised and bequeathed all his property to his wife, Isabella Marian Battersby for life, and in the event (which happened) of there being no issue of their marriage testator gave, devised, and bequeathed the whole of his said property unto his brothers and sisters in equal shares and proportions or unto the families of such of them as should be then dead. Testator's wife by her will dated 14th June, 1892, appointed Charles Fortescue M'Clintock executor, and died on the 30th April, 1894. The property of the said Thomas Battersby represented by the sum of £2872 0*s.* 8*d.* new Consols, the income of which his widow had received during her life, was lodged in Court under the Trustee Act, 1893, and a motion for payment out having been made it was by order of the 18th November, 1895, referred to Chambers to ascertain who were the parties entitled to the Stock and cash as representing the families of the brothers and sisters of the testator.

Testator left him surviving two brothers, Richard and James, and one sister, Elizabeth, all of whom died in the lifetime of testator's widow.

Richard had four children, namely, Richard, junior, who died the 25th January, 1895, leaving issue Douglas who is still living; James, junior, who died the 5th April, 1877, leaving issue; and Mary who died the 12th February, 1893, leaving issue.

James had four children; Cyrus died the 19th April, 1869; Rosaline Reid (who is still living); Helena died 1851; and James, junior, died in 1849.

Elizabeth who married Charles Oliver Baylis had four children: Hannah who died 1857; Frederick who died 1887; and Henry Mackford and Mary Stelling, both of whom are still living.

Stanley, Q.C., for Henry Mackford Baylis :—

The primary meaning of the word "family" is children: *In re Mulqueen's Trusts* (1); *Pigg* v. *Clarke* (2). I admit that the children of testator's brothers and sisters take *per stirpes* the gift being substitutional: *Congreve* v. *Palmer* (3); *Timins* v. *Stackhouse* (4). The gift to the families is a gift in joint tenancy, *inter se*. The words "in equal shares" cannot be extended to the substitutional gift: *In re Sibley's Trusts* (5); *Heasman* v. *Pearse* (6); *In re Yates* (7). *Shepherdson* v. *Dale* (8) is now overruled. The result is that Elizabeth's share went to her son Henry Mackford and her daughter Mary as joint tenants in equal shares. Rosaline Reid is entitled to the share of her father James, and if there was no severance of the joint tenancy Richard's son, Douglas, on the death of his brother Richard, became entitled to the entire of his

(1) 7 L. R. Ir. 127.
(2) 3 Ch. D. 672.
(3) 16 Beav. 435.
(4) 27 Beav. 434.
(5) 5 Ch. D. 494.
(6) L. R. 7 Ch. App. 275.
(7) [1891] 3 Ch. 53.
(8) 12 Jur. (N. S.) 156.

father's share. There are no words of severance used by the testator with reference to the shares of members of the families who might take in substitution for their parents.

Price, Q.C., for Mrs. Marie Battersby, the personal representative of James, junior, the son of Richard Battersby :—

The gift by substitution follows the same rule as the gift for which it is substituted, and the children of testator's brothers and sister take as tenants in common. The word "or" did not occur in the cases cited by Mr. Stanley. In *In re Yates* (1) there was a parenthesis before the words "share and share alike." The word "or" carries on the nature of the gift as conferring a tenancy in common on the children of testator's brothers and sister. [Counsel referred to *Commissioners of Charitable Donations* v. *Deey* (2).]

Craig, Q.C., for the other grandnephews and grandnieces of testator, admitted that he could not argue that the gift extended to his clients, having regard to the authorities cited.

THE VICE-CHANCELLOR ruled that the classes to take under the bequest of the testator's property after the death of his wife were to be ascertained at the dates of the respective deaths of testator's brothers and sister, and held that the word "family" was to be restricted to the children of testator's brothers and sister, and that the funds in Court were distributable *per stirpes.*

His Lordship also held that the nephews and nieces who survived the testator need not, in order to participate in the benefit of the gift, have survived the tenant for life inasmuch as they took by substitution; but that the words "in equal shares" could not be held to extend to the substitutional gifts, and that therefore the nephews and nieces took *inter se* as joint tenants.

All parties were given their costs out of the assets.

Solicitors: *Milward Jones, & Cameron.*

T. H. M.

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(1) [1891] 3 Ch. 53.

(2) 27 L. R. Ir. 289.

SINCLAIR *v.* SINCLAIR.

Matrimonial.
1896.
June 2, 15.
Oct. 28.

Petition for divorce—Previous divorce in England of parties domiciled in Ireland—Jurisdiction.

A, a domiciled Irishman, intermarried with B, an Irishwoman, at Bombay, India, on March 4th, 1878. There was one child issue of the marriage. In November, 1883, A presented a petition for a divorce to the High Court in England, on the ground of B's adultery with C. B did not defend the suit, and on July 15th, 1884, a decree *nisi* was made, and also an order as to the custody of the child. On January 27th, 1885, the decree *nisi* was made absolute. On April 15th, 1886, an order was made, varying the trusts of the settlement executed on the marriage of A and B. B subsequently went through the ceremony of marriage with C, and lived with him as his wife. The trustees of the settlement afterwards refused to obey the order of April 15th, 1886, on the ground that A and B were domiciled in Ireland at the time, and that therefore the English Court had no jurisdiction to entertain the divorce proceedings.

On April 7th, 1896, A presented a petition for a divorce *a mensa et thoro* to the High Court in Ireland, on the ground of B's adultery with C, alleging that the English divorce was not binding.

The Court was of opinion that the real object of the suit was to enable the petitioner to obtain a private Act of Parliament for the dissolution of the marriage, and, being of opinion that a decree of divorce *a mensa et thoro* was not a necessary preliminary to such an Act, dismissed the petition.

Observations on the practice of appearing without protest against the jurisdiction of the Court.

TRIAL OF CAUSE.

This cause was commenced by a petition filed the 8th April, 1896, by Alfred Law Sinclair, of Hollyhill, Strabane, in the county of Tyrone, a major in the Indian Staff Corps, for a divorce *a mensa et thoro*, from his wife, Isabella Sinclair, otherwise Tyacke.

The material facts were stated in the petition, which was as follows:—

1. That your petitioner was, at the time of his marriage, hereinafter mentioned, and ever since, has been, and now is, a domiciled Irishman.

2. That, on the 4th day of March, 1878, your petitioner was

Matrimonial.
1896.
SINCLAIR
v.
SINCLAIR.

lawfully married to Isabella Sinclair, then Isabella Edwards, spinster, who was a domiciled Irishwoman, at Byculla Chapel, Bombay, in the Empire of India.

3. That, after his said marriage, your petitioner lived and cohabited with his said wife, at Hydrabad, Scinde, and other places in the Empire of India, and at divers other places, and there is now living issue of the said marriage one child, videlicet, Helen Eila Sinclair, born on the 29th day of November, 1881.

4. That the said Isabella Sinclair, otherwise Tyacke, has frequently since December, 1881, committed adultery with Richard Humphrey Tyacke.

5. That, from the month of March, 1883, down to the presentation of the petition hereinafter mentioned in the High Court of Justice in England, the said Isabella Sinclair, who had deserted your petitioner, lived with the said Richard Humphrey Tyacke, and, during that time, frequently committed adultery with him at Kashmere, India, and elsewhere.

6. On the 9th day of August, 1883, your petitioner presented a petition in England, in the High Court of Justice, Probate Divorce, and Admiralty Division, charging his said wife with having committed adultery with the said Richard Humphrey Tyacke, and, praying that his said marriage might be dissolved and that he might have the custody of his said child. Your petitioner described himself in the said petition as of Hollyhill, Strabane, in the county of Tyrone.

7. By an order of the President of the said Division of the High Court of Justice, dated the 15th day of July, 1884, it was decreed that the said marriage should be dissolved by reason that since the celebration thereof the said Isabella Sinclair, the respondent in said petition, had been guilty of adultery, unless sufficient cause should be shown to the Court within six months from the making thereof, and the custody of the said child was granted to your petitioner.

8. No cause was shown against the making of the said decree absolute, and on the 27th day of January, 1885, said decree was made absolute.

9. The said Isabella Sinclair, the respondent in the said petition, after the said decree had been made absolute, went through

the form of marriage with the said Richard Humphrey Tyacke, and has been ever since living with him as his wife, and is known by the surname of Tyacke.

10. An order of the said Division of the High Court of Justice in England was made on the 19th April, 1885, modifying the trusts of the settlement dated 31st December, 1877, entered into on the said marriage consequent upon the said decree dissolving the said marriage.

11. Subsequently, the trustees of the said settlement, upon being called upon to act on the said last-mentioned order, raised the question, that your petitioner and the said Isabella Sinclair, otherwise Tyacke, had an Irish domicil by origin, and that your petitioner and the said Isabella Sinclair, otherwise Tyacke, had never lost such domicil of origin, and that the said decree and order of the 19th April, 1886, were made without jurisdiction, and were null and void, and that the marriage of your petitioner had never been dissolved.

12. Your petitioner was, at the time of the said marriage, and of making of the said decree and order, and still is, an officer in the Indian Staff Corps.

13. Your petitioner is advised that the said decree and orders were made without jurisdiction, and that the said Isabella Sinclair, otherwise Tyacke, is still the lawful wife of your petitioner, and that it is necessary for the purpose of procuring a divorce *a mensa et thoro* from his said wife, that a petition should be presented in this Honourable Court.

On May 2nd, 1896, the petitioner, who was about to leave Ireland for foreign service, was examined in Court, and deposed to the facts stated in the petition. He stated that proceedings were taken in England by the advice of his lawyers, and that he had no intention to avoid the jurisdiction of the Irish Court, and knew nothing of the question of domicil. The trial took place before the Court itself, on June 2nd, 1896, when evidence was given that Major Tyacke and the respondent were living together in England as husband and wife. The respondent was served with notice of all proceedings in the cause, but did not appear.

Arthur Samuels, Q.C., and *Henry Richards*, for the petitioner:—

The domicil of the petitioner was Irish; it was such by origin, and was never changed. His military service under the Crown as a member of the Indian Staff Corps did not affect it: *Attorney-General* v. *Napier* (1). The domicil of the wife followed that of the husband, and was Irish also. The petitioner had not even a residence in England at the time of the presentation of the petition and decree in the English Divorce Court, and accordingly the decision in *Niboyet* v. *Niboyet* (2) cannot be relied on as supporting the English decree. As there was neither residence nor domicil in England, the English Court had no jurisdiction, and the decree for divorce and the proceedings founded on it are invalid, and cannot be recognised in Ireland, or in any other country, as dissolving the marriage. The domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage: *Dolphin* v. *Robins* (3); *Shaw* v. *Gould* (4); *Le Mesurier* v. *Le Mesurier* (5); *Wilson* v. *Wilson* (6); *Yelverton* v. *Yelverton* (7); *Harvey* v. *Farnie* (8). The domicil of the husband will sustain the jurisdiction of the Irish Court over the wife, though married abroad, always resident abroad after marriage, and charged with adultery committed abroad: *Gillis* v. *Gillis* (9); *Brodie* v. *Brodie* (10).

The English divorce having been granted without jurisdiction, the Court in Ireland should disregard that decree, and grant the petitioner a divorce *a mensa et thoro*: *Tollemache* v. *Tollemache* (11); *Wilson* v. *Wilson* (12); *Shaw* v. *Attorney-General* (13); *Green* v. *Green* (14).

A decree of divorce *a mensa et thoro* from a Court having jurisdiction in the cause is a necessary preliminary before the petitioner can proceed for a divorce in Parliament: Macqueen on

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(1) 6 Ex. 217.
(2) 4 P. D. 1.
(3) 7 H. L. Cas. 390.
(4) L. R. 3 H. L. 55.
(5) [1895] App. Cas. 517.
(6) L. R. 2 P. & D. 442.
(7) 1 S. & T. 574.
(8) 8 App. Cas. 43.
(9) Ir. R. 8 Eq. 597.
(10) 2 S. & T. 259.
(11) 1 S. & T. 557.
(12) L. R. 2 P. & D. 435.
(13) *Ibid.* 156.
(14) [1893] P. 89.

Appeals, 506; Standing Orders of House of Lords, 175. The proceedings in *Tollemache's Divorce Bill* (1) in 1857 show that the House of Lords will not entertain such a bill, unless there has been a decree of an Ecclesiastical Court. The bill there was presented alleging a Scotch divorce, and on account of this being a divorce by a Civil Court, it was referred to a committee to search for precedents; no such precedent being found, the bill was rejected. The proceedings of the petitioner being *bona fide*, no difficulty arises on account of the delay in proceeding in Ireland: *Tollemache* v. *Tollemache* (2); *Wilson* v. *Wilson* (3). As to the English Order No. 22 of the Divorce Rules of 1865, providing that, if any question of jurisdiction is to be raised, the party cited should enter an appearance under protest, it is to be observed —(1) that the cause in England went by default, no appearance having been entered by the wife, and (2), that such an order, even if it would enable the divorce to be considered as valid in England, could not give to the divorce any extra-territorial validity.

THE PRESIDENT :—

June 15.

This is a petition for a divorce *a mensa et thoro*.

Colonel Sinclair, the petitioner, was married in 1878, in India, to Miss Edwards, the respondent, described in the petition as "Isabella Sinclair, otherwise Tyacke." Deeds of settlement were executed on the occasion of this marriage, and there is one child issue thereof now living. I find, upon the evidence before me, that some time prior to April, 1883, Mrs. Sinclair committed adultery with a person named Richard Tyacke, and on the 9th April, 1883, Colonel Sinclair presented a petition to the Divorce Court in England, against his wife, who did not appear in the suit.

On the 27th January, 1885, a final decree for a divorce was made by that Court, and on the following 19th April an order was made varying the trusts of the marriage settlement, to which I have referred. In March, 1885, the respondent, in England, married, or went through the ceremony of marriage with Tyacke, and they have since that time lived together as husband and wife. It does not appear whether there is any issue of this marriage. Colonel Sinclair recently applied to the trustees of the

(1) H. L. Jour. 1857, Aug. 3. (2) 1 S. & T. 557. (3) L. R. 2 P. & D. 435.

Matrimonial.
1896.
SINCLAIR
v.
SINCLAIR.

marriage settlement to act upon the order of the 19th April, 1885, but they refused, alleging that the divorce proceedings in England were null, and the consequent order void, inasmuch as the parties were then domiciled in Ireland, and the English Court had no jurisdiction in the case.

Upon the evidence I conclude that Colonel Sinclair and his wife were British subjects, personally present in England, and that Mrs. Sinclair was living in adultery with Tyacke in England, at the time of the proceedings in the English Court, and I also conclude, on the evidence of Colonel Sinclair, that at this time the domicil of the parties was Ireland.

The question raised by the trustees, viz. the nullity of the divorce decree, and the invalidity of the consequent order, might be raised and decided in the English Courts. I suppose an action would lie against the trustees, if their refusal was illegal, or that the trustees might obtain a declaration as to their duty under the Trustee Acts.

However, no proceeding has been taken in England, but Colonel Sinclair has presented this petition for a divorce *a mensa et thoro* in Ireland. In dealing with this case I do not propose to decide anything as to the effect of the English decree. My impression is that, under the English Divorce Act of 1857, the English Court has jurisdiction to make a decree for a divorce *a vinculo* between British subjects personally present within the jurisdiction of English Courts, where adultery is carried on in England, notwithstanding a foreign domicil, in cases where the petitioner, by the very act of petition, and the respondent, by appearing without protest, or by not appearing at all, submit to the jurisdiction of the Court. On the other hand, I think that by the law of nations, the validity of such a divorce is limited to the country where the decree is made, unless it is the country of the domicil of the parties, and does not extend to foreign countries, and for this purpose, as regards English decrees, Ireland is a foreign country. Accordingly, in the present case I am inclined to think that the English decree is valid in England; that a prosecution for bigamy could not be maintained against the wife in England (I refer to 1 Russell on Crimes, edition, 1896, p. 662, and note (*a*)), and that her children, if any, by Tyacke, are not in

England bastards. In *Tollemache* v. *Tollemache* (1) the validity in Scotland of the divorce and marriage of the wife, was not questioned, and in *Niboyet* v. *Niboyet* (2), Cotton, L.J., at p. 25, says, of the decision :—"That is, in effect, that the decree of the Scotch Court for divorce, *though effectual there*, was of no effect in England;" and all through the judgment of Lord Watson, in *Le Mesurier* v. *Le Mesurier* (3), this distinction seems to run. I refer to the marginal note, "so to divorce," *et seq.*, and at p. 527, I find this passage: "In order to sustain the competency of the present suit it is necessary for the appellant to show that the jurisdiction assumed by the District Judge of Matura, was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country;" again, at p. 528: "On the other hand, a decree for a divorce *a vinculo*, pronounced by a Court, whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunal the spouses were amenable, claim extra-territorial authority." I may refer to the passage quoted from Bar (4) at p. 538, and the conclusion arrived at by the Judges at p. 540. To the same effect is the judgment in *Green* v. *Green* (5), where the learned Judge says, at p. 92 :—"In my opinion the American decree was unjustly obtained against the petitioner, who never submitted himself to the jurisdiction of the American Court, and it was obtained on grounds which would not have entitled the parties to a decree in this Court. There is no case, precisely in point, but on the principle laid down in *Shaw* v. *Attorney-General* (6),

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(1) 1 S. & T. 561.

(2) 4 P. D. 24.

(3) [1895] App. Cas. 517.

(4) International Law, 2nd edition, translated by Gillespie, p. 382.

(5) [1893] P. 89.

(6) L. R. 2 P. & D. 156.

Matrimonial.
1896.
SINCLAIR
v.
SINCLAIR.

it is clear that though the decree of divorce may be treated as valid in America, this Court cannot recognise it as putting an end to a marriage which is binding in this country, the petitioner being domiciled in England."

I must now refer to the General Order of the English Court (Rules 26th December, 1865, No. 22) which has the same effect as if it was part of the Act. A similar Order exists in Ireland (Order LXX, R. 17). The words are:—"If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry his or her act or petition in extension of such protest, and on the same day deliver a copy to the petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction."

As I understand this rule, its meaning and effect are that, if the parties submit to the jurisdiction of the Court, the Court will proceed without inquiry on the subject of domicil to hear the case, and if proper make a decree for divorce *valeat quantum*, i.e. valid in England, but, perhaps, not valid abroad; and accordingly, in this case, though Colonel Sinclair described himself as "of Hollyhill, Strabane, Co. Tyrone, Ireland," *prima facie* a declaration of an Irish, *i.e.* foreign domicil, the Judges of the English Court, Sir James Hannen." in 1883, and Sir James Hannen in 1885 pronounced decrees *nisi* and final, on the faith of which Mrs. Sinclair married Tyacke. If there is a protest in such a case the Court refuses to grant a divorce of merely domestic validity.

It is not necessary for me to decide, nor do I decide, any of the questions to which I have adverted, upon the effect of the English decree. But having referred to the various interests in that decree of persons who are not within my jurisdiction, and to the fact that this is an undefended suit, and to the important topics discussed, I have arrived at the conclusion that it is expedient that the whole case should be dealt with in the first instance by a competent tribunal of supreme authority, of course I mean the House of Lords. Am I then coerced to make the decree sought? If indeed the decree was to be one for a divorce *a vinculo*, it might possibly be my duty to follow *Tollemache* v. *Tollemache* (1); but I think a mere

(1) 1 S. & T. 1.

decree for a judicial separation is open to different considerations. Eleven years have elapsed since the English decree was made; the position of the wife is changed. Delay is not fatal; but it justifies a consideration of the true objects of the suit: *Matthews* v. *Matthews* (1). Now it is certain that the object, the final object of this suit, is not a divorce *a mensa et thoro*. There exists a complete conjugal separation, and no suggestion has been made of any danger of the disturbance or attempted termination thereof. What, then, is the real object of these proceedings? It is desired as a preliminary to a private Act of Parliament, and it is said that the decree of this Court is an essential condition precedent to such an Act. There is a Standing Order of the House of Lords (Order 1895, No. 175), as follows:—"No petition for any bill of divorce shall be presented to this House unless an official copy of *the proceedings taken* or had in the Court having jurisdiction over matrimonial causes at the place of his domicil or residence or in some other Court having jurisdiction in that behalf at the suit of the party desirous to present such petition be delivered upon oath at the Bar of the House." Observe that this order does not require a sentence, as the obsolete Order of 1798 did: see Macqueen, Appendix VI.

I concur in the propriety of a petition to the House of Lords; and if my decree was required, I consider that it would be my duty to consider and decide all questions material to such a decree. But, in my opinion, such a decree is not necessary. In the first place it is not required by the terms of the existing Order (contrasted with those of the Order of 1798), and even if the Order did require the production of a definite decree, not only has the House of Lords power to dispense with its standing Order, but it has exercised that power, as in the *Norfolk* and *Macclesfield Cases*, and in a modern case, justly relied on as similar to the present; I refer to *Tollemache* v. *Tollemache* (2). The facts are sufficiently stated in the marginal note of the report in Swabey & Tristram;—"A domiciled Englishman intermarried with a Scotchwoman at Gretna Green, and at St. George's, Hanover-square, in August, 1837. B. and C. cohabited together in Wales,

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(1) 1 S. & T. 557.

(2) *Ibid.* 557.

England, and Scotland, but principally in the latter till March, 1841, soon after which date C. eloped with P., whereupon B. obtained a sentence of divorce in the Court of Session in Scotland on the 3rd of July, 1841. On the 26th of July, 1841, C. intermarried with P. at Glasgow, and lived with him until his death in June, 1855. B. at first supposed the sentence of the Scotch Court to be of universal operation, and that supposition was confirmed by opinion of counsel in 1846. In 1854 he obtained the opinions of two counsel to the effect that the Scotch sentence would have no validity in England; in consequence of which he presented a petition for leave to bring into the House of Lords a bill declaring his marriage with C. absolutely void since the 3rd of July, 1841, which petition was rejected."

The proceedings in the Lords will be found in the Journals of the House, 20 & 21 Vict., commencing on p. 74. A petition was presented to the House for an Act dissolving the marriage retrospectively from 3rd July, 1841, the date of the Scotch divorce. On the 12th June the notice of the House was directed to the fact that no decree of an Ecclesiastical Court for a divorce *a mensa et thoro* had been presented. On the 15th June the Standing Order in question was considered, and it was ordered that the Standing Order should be dispensed with on this petition, and it was ordered that the petition itself should be referred to a special committee as to the retrospective character of the proposed Act. On the 3rd August the Special Committee reported that there was no precedent for such an Act, and therefore the bill was not further proceeded with.

I venture to make one further observation upon the principles of law involved in the subject which I have discussed. Upon the hypothesis that the opinions which I have expressed upon the effect in England or in Ireland, or any other foreign country, of a divorce in such a case as that of Colonel Sinclair, and upon the construction of the Order as to appearance under protest, are correct, I confess I think that Order is calculated to promote the evil denounced by Lord Watson in *Le Mesurier* v. *Le Mesurier* (1), where he spoke of "the scandal which arises when a man and a woman are held to be man and wife in one country, and strangers in another," and that law and practice would be improved in a moral and social aspect, if for that Order was substituted one which required the petitioner to state on oath his domicil or other facts, if any, which invested the domestic tribunal with international jurisdiction.

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(1) [1895] App. Cas. 517, at p. 541.

In conclusion, under the circumstances of this cause, I decline to make a decree for a divorce *a mensa et thoro*. If the petitioner desires, I shall allow this case to stand over, and in the event of a refusal by the House of Lords to proceed without such a decree, it may hereafter be brought up for further consideration, or, if the petitioner prefers, I shall make an order to dismiss the petition.

Oct. 28.

The case appeared in the list on this day for formal judgment; and on the application of counsel for the petitioner, an order was made and the petition dismissed.

W. L.

Appeal. Dec. 2.

On appeal, the Court of Appeal (Fitz Gibbon, Barry, and Walker, L.JJ.) made the following order:—

> "IT appearing that the petitioner has already obtained a decree of divorce from the High Court of Justice in England, dated the 27th January, 1885, let this appeal be retained in this Court until further order, to enable the petitioner to apply, if so advised, to the High Court of Parliament for an Act annulling his marriage, with liberty to re-enter the appeal for further consideration in the event of its being found necessary for the prosecution of such proceedings to obtain a decree of the High Court of Justice in Ireland, Matrimonial Division, for a divorce *a mensa et thoro*, this Court being of opinion that the proceedings for a divorce *a mensa et thoro* ought not to be prosecuted unless that course was rendered necessary in order to obtain the Act of Parliament for which a petition was intended to be presented."

Solicitors for the petitioner: *S. S. & E. Reeves & Sons.*

R. D. M.

Ross, J.
1896.
Oct. 30.

IN THE MATTER OF THE ESTATE OF SIR E. J. GROGAN, AND OF FOUR OTHER ESTATES LISTED FOR SALE.

Sale, Land Judge's Court—Land Law (Ireland) Act, 1896 (59 & 60 *Vict.* c. 47), *sect.* 40 (1)—*Receiver—Solvent and insolvent estates—Practice.*

Sect. 40, sub-sect. (1) of the Land Law (Ir.) Act, 1896, is mandatory on the Land Judge in all cases that fall within its scope. These are lands agricultural or pastoral, or partly agricultural or partly pastoral, in the occupation of tenants (*a*) where a receiver has been appointed, (*b*) where the estate is insolvent. The sub-section does not apply to solvent estates over which no receiver has been appointed (1).

FIVE estates were listed for sale on this day, being the first occasion after the passing of the Land Law (Ireland) Act, 1896, for which sales in Court were advertised.

The several solicitors having carriage were in attendance.

Ross, J.:—

Before I can permit any of the estates listed for to-day to go on I am obliged to consider the effect of the 40th section of the Irish Land Act of 1896 upon the procedure of this Court. In the estates before me I have materials to discriminate between lots comprising agricultural and pastoral lands in the occupation of tenants and lots comprising lands that are not agricultural or pastoral in whole or in part. As regards the latter, no change has been effected by the statute, and the sales will proceed in the ordinary way. But as to lots comprising agricultural or pastoral lands in the occupation of tenants, in cases where a receiver has been appointed, what I have to consider is whether I am at liberty to permit the sales to proceed in the ordinary way to-day. If I were at liberty to do so I would certainly allow the sales to go on, inasmuch as heavy expenses in the way of advertisements and such like have been incurred, which would probably be absolutely fruitless if the contemplated sales were not suffered to take place. Sensible as I am of the hardships which may probably result from stopping these sales, I cannot allow such sales to go on. Interpreting the section of the Act of Parliament as best I can, I am unable to find in the section that any discretion has been left to me as Land Judge other than a discretion as to the order in which the sales are to proceed. I hold that the section is mandatory upon this Court in all cases that fall within its scope. Every case now before me in which a receiver has been appointed is clearly within the section, and I am not at liberty to permit the sale of any such lots to proceed. I consider that I am bound to put the special machinery of the section into operation in such cases by issuing my request to the Land Commission at the proper time. I think that the Land Commission are bound to comply with the request, and that I shall be then obliged to offer the fee-simple to the occupying tenants at such price as I think just. Until all this is done the section prohibits the ordinary sales of agricultural and pastoral lands in the occupation of tenants, and over which a receiver has been appointed, from taking place. The tenant has acquired a right he never had before, namely, a distinct interest in a sale, of which I cannot lawfully deprive him. In case the tenants ultimately refuse to purchase at the price so fixed by me, I shall then be at liberty to accept offers from persons other than tenants.

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(1) The prefatory words of the subsection are as follows:—"Where an absolute order for the sale of an estate, comprising holdings to which this section applies, has been made under the Landed Estates Court Act, 1858, and either a receiver has been appointed over the estate, or the estate is so circumstanced that it would independently of this Act be sold without the consent of the owner as to price, the following provisions shall have effect."

I have now a much more difficult question to consider. Assuming the section to be mandatory, what is the meaning of the alternative clause, "or the estate so circumstanced that it would, independently of this Act, be sold without the consent of the owners as to price." This clause might be held to embrace the case of every incumbered estate. An estate worth £100,000 charged with £1000 is, in a sense, "so circumstanced that it would be sold without the consent of the owner as to price." After considerable consideration and very grave doubt I have formed the opinion that this is not the meaning of the words. If such had been the intention of the Legislature it would have been easy to have expressed that intention in words free from all ambiguity. I am convinced that this carefully-framed clause was drafted by those who had in view the practice and procedure of the Land Judge's Court. The expression "would, independently of this Act, be sold" pointed to the ordinary practice of the Court in which sales take place. The practice of this Court has been laid down in the judgment of Judge Flanagan in the case of *Domvile's Estate* (1). The learned Judge, in giving judgment in that case, says (p. 9 of the report) :—"It is only right for me to state here what my practice is in reference to sales in this Court. It is utterly impossible for me from figures upon paper to form an opinion more than approximately of the real value and selling price of a property. I can, of course, form an idea of it from rentals and valuations referred to; but I never sell property here relying merely on my own judgment, and without consulting the parties whom I consider interested in the proceeds of the sale—that is to say, in the case of incumbered estates, the persons representing the incumbrancers, and in cases of perfectly solvent estates, the owners of the estates. The principle I have always acted on in dealing with an unincumbered estate is this: When the owner represents to me that the sums offered for it are not the fair value of it, I invariably reject those offers; but if, having regard to the circumstances of the case, I form the opinion that the owner is putting an absurd and capricious price upon his property, and is refusing what I consider reasonable offers, I do not allow him again and again to bring intending purchasers here to bid imaginary prices, but I dismiss the petition."

In the cases of petitions filed by incumbrancers, or owners of incumbered estates, it has never been the practice of this Court to sell more of an estate than might be sufficient for the discharge of the incumbrances affecting the estate. The greatest care is taken in framing the rentals for this purpose. According to the practice of the Court an estate would only be sold without the consent of the owner as to price in cases where the equity of redemption was valueless. Therefore I hold that in cases where no receiver has been appointed, and where the estate is solvent, the 40th section does not apply, and I shall allow the sale of that class to-day to go on. In the other cases of agricultural and pastoral holdings in the occupation of tenants, where a receiver has been appointed, I hold that I have no power, without first offering them to the tenants, to allow any sale to proceed. I therefore, most unwillingly, having regard to the money spent in advertising, and having regard to the inconvenience which may be occasioned to the public, must adjourn all such sales for one month from this day, to allow the parties to take a test case to the Court of Appeal on this important question. I shall draw up an order in such a way as to enable their Lordships to decide the real point as to my jurisdiction; and in the event of my order not being reversed, I must adjourn these sales *sine die*.

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(1) I. R. 11 Eq. 1.

W. G.

INDEX.

ABATEMENT—Rentcharge—Eviction of part of lands charged - - - 494
See ANNUITY. 2.

ACKNOWLEDGMENT — Deed — Married woman - - - - - 520
See GRAFT.

—— Mortgagor—Payment of interest by devisee - - - - 206, 223
See LIMITATIONS, STATUTE OF. 1.

ACQUIESCENCE - 206, 223, 340, 345
See LIMITATIONS, STATUTE OF. 1.
TRUSTEE. 1.

ADMINISTRATION — *Practice — Grant to guardian an behalf of one minor—Other minors interested—Citation of married women abroad dispensed with.*] A bachelor died intestate and insolvent, his only assets being £48 cash and £11 arrears of rent, leaving his only next-of-kin the children of three deceased sisters; the children of one sister were minors and wards of Court; the children of another sister were minors, but not wards of Court; the children of the third sister were married and living abroad. The Court made a grant to the guardian of the eldest minor, who was a ward of Court, without requiring the married children to be cited. *In the Goods of Magrath* - - - - - PROB. 203

2. —— *Practice—Limited—Grant for the purpose of vesting trust term in new trustees.*] Where, upon the occasion of the appointment of new trustees of a settlement, which comprised, amongst other trust funds, a charge on the settled lands which had been paid off by the former trustees, and an assignment of it taken from the persons beneficially interested therein, the new trustees required that a term of years created for the purpose of securing the charge, which had not been assigned to the former trustees, should be transferred to them, and there was no personal representative of the surviving trustee of the term living, the Court, on the application of the attorney of the person beneficially entitled to the charge who was resident abroad, gave liberty to his attorney to apply for a grant limited to assigning the term to the new trustees. Form of order. *In the Goods of Vereker* - - - - - PROB. 200

—— *Durante minore ætate*—Sale of chattel real - [356, 362
See ADMINISTRATOR.

ADMINISTRATION SUIT — Judgment—Legacy—Assent of Executor—Dealing with assets - - - - - 401
See EXECUTOR.

ADMINISTRATOR—*Vendor and purchaser—Powers of administrator* durante minore ætate—*Sale of leaseholds.*] An administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate, if it is necessary in due course of administration, although not necessary for payment of debts. The assets of a deceased person consisted of a public-house, held under lease for a term of thirty-one years, of which ten years were unexpired, subject to a rent of £30 per annum. The lease contained a covenant against subletting, and the reversion had been purchased by a rival publican, who refused to renew at the expiration of the lease. The administrator *durante minore ætate* was an elderly man, who had no knowledge of the publican's business, and the persons beneficially entitled to the assets were two minors who required an advance of money. The public-house had been let at a rent of £120 a-year, but this tenancy had been determined as being a breach of covenant:—*Held*, by the Court of Appeal (FitzGibbon and Walker, L.JJ.), reversing the decision of the Master of the Rolls, that the administrator *durante minore ætate* had power to sell, and that the purchaser was not entitled to a statement that he was selling for the purpose of payment of debts. *In re Thompson and M'William's Contract* - - - M.R. 356; APP. 362

ADVANCEMENT—*Will—Power—Appointed share—"Vested"—"Benefit"—Discretion of trustees.*] A testator, by his will, bequeathed to his son and his son's wife successive protected life interests in the income of a residuary fund, and

ADVANCEMENT—*continued.*
gave them a power to appoint the fund among their children, and directed that in default of appointment their children should take the fund in equal shares. There followed this gift the usual hotchpot and advancement clauses; but, by the power of appointment the donees were enabled to direct what power of advancement the trustees should have in respect of any appointed share. The donees, in exercise of the power, appointed by deed to one of their children a portion of the residuary fund, subject to their life interests. The deed of appointment contained no advancement clause:—*Held*, that the appointment was to be read into the will, and that the advancement clause in the will applied to the appointed share. *M'Mahon* v. *Gaussen* - - - V.-C. 143

AFFIDAVIT—Substitution of service—Originating summons—British subject 416
See Substitution of Service.

AGENT—Authority of—Consent to assignment of lease - - - - - 520
See Covenant against Alienation.

—— Company—Director - - - 56
See Mortgage. 1.

—— Corporation—Contract not under seal 65
See Corporation.

ALIMONY—*Increase of—Faculties of husband—Support of children by wife.*] If the husband is relieved from the obligation of supporting his children by reason of the custody of the children being given to the wife, his faculties are thereby increased, and the Court can increase the permanent alimony already given to the wife. *Halligan* v. *Halligan* - - - Mat. 244; App. 248

AMENDMENT — Pleading — Offer to redeem - - - - 442, 473
See Unconscionable Bargain.

ANNUITY — *Deed — Construction — Agreement out of "first and readiest of means" to pay annuity —Whether a charge on property—Subsequent grant of jointure under a power, whether a performance.*] By a contract of marriage, executed in Scotland, and dated the 8th August, 1850, on the marriage of *J. S.* and *E. E.*, *J. S.* bound himself, his heirs, executors, and successors, out of the first and readiest of his means, estate, and effects, to make payment to the said *E. E.* in case she should survive him, of a free life-rent annuity of £200, free of all burdens and deductions, at two terms in the year (Whitsunday and Martinmas), by equal portions, the first payment to be made at the first of these terms after the death of *J. S.*, with one-fifth more of penalty in case of failure of payment; this annuity to be in full of all terce of lands, third or half of moveables; and, after making certain provisions for the children of the marriage, the deed provided that if the said *E. E.* survived the said *J. S.* a sufficient sum from his estate and effects should be laid aside and secured for answering the annuity before the children should draw any part. For securing performance of the aforesaid obligations *F. S.* (the father of *J. S.*) bound himself and his heirs for payment to *E. E.* of £100 a-year, one-half of the aforesaid annuity, and agreed to execute any deed necessary for securing payment thereof out of the lands of *T.* in the county of Kerry, and *J. S.* bound himself to insure his life for £1500 to secure the balance of the annuity. *J. S.* further bound himself, within a year of his father's death, to secure on rea. property the payment of the said annuity to the full amount, at least so far as not secured by *F. S.*, and *J. S.* covenanted to execute such deeds as might be necessary for the performance of the aforesaid obligations. The deed also contained provisions settling *E. E.'s* fortune. *F. S.* by will, dated the 11th February, 1861, devised his real estate in the county of *T.* to his eldest son *W. S.* for life, with remainder to his sons in tail male, with remainder to *J. S.* for life, with remainder to his sons in tail male, with remainder to *G. S.* for life, with remainders over, with power to each successive tenant for life to charge a jointure of £200 a-year for any wife he might marry. *F. S.* died in 1861 without having executed any deed for securing payment of the £100 a-year, half of the annuity, and *W. S.* died in March, 1889, leaving no issue him surviving. By indenture dated the 1st May, 1889, *J. S.* in exercise of the power in the will, charged the estates with a jointure of £200 a-year for his wife *E. S.*, to commence from the date of his death, payable half-yearly by two equal payments. In an action to administer the assets of *J. S.*, *E. S.* claimed that the entire of his real and personal estate was chargeable with the annuity of £200 a-year under the marriage contract of the 8th August, 1850, in priority to the general creditors of *J. S.*:—*Held*, by the Vice-Chancellor and by the Court of Appeal, that the marriage contract of the 8th August, 1850, did not create a charge on the property of *J. S.* *Held*, also, by the Court of Appeal, reversing the decision on this point of the Vice-Chancellor, that the appointment of the jointure by the deed of the 1st May, 1889, was not a performance of the contract to secure the annuity by the marriage contract of 1850. *Bannatyne* v. *Ferguson* V.-C. 149; App. 162

2. —— *Will—Charge on lands—Devise of lands charged—Portion of lands claimed by title paramount—No abatement of annuity—Amount payable in full out of remainder of lands.*] A testator devised certain property to his daughter *M. M. B.* absolutely, and devised and bequeathed to his granddaughter *A. E.* the sum of £1000, or £50 per annum, whichever his executors should think fit or most advantageous for her, the said sum of

ANNUITY—*continued.*

£1000, or £50 per annum, to be paid by his said daughter, and to be chargeable and payable out of the property so bequeathed to her. One undivided third of the property was subject to the trusts of a settlement, under which *M. M. B.* took a life interest, with remainders over; and the testator had no power to dispose of same. In a cause petition matter brought by *A. E.* and her husband against *M. M. B.* and her husband, the petitioners were declared entitled to a perpetual annuity of £50 charged on the property devised to *M. M. B.* On the death of *M. M. B.* the person entitled to the one-third in settlement claimed the same. There was nothing in the will to show an intention that the property was to be enjoyed by the chargeant and the devisee of the property itself in aliquot proportions:—*Held*, that the annuity was not liable to abate, and that *A. E.* was entitled to be paid the same in full out of the remaining two-thirds of the property. *In re Saunders-Davies* (34 Ch. D. 482) followed. *Long* v. *Short* (1 P. Wms. 403) and *Jackson* v. *Hamilton* (9 Ir. Eq. R. 430) considered. *Roche* v. *Jordan* V.-C. 494

3. —— *Will—Direction to pay—Charge on real estate—Exoneration of personal estate.*]—A testator devised and bequeathed all his real, freehold, and leasehold property in land, houses, or fee-farm rents to his son *L*, and, after giving certain legacies to his four daughters and others, he directed that his said daughters should reside with *L.* while they remained unmarried; and in case of any of them not agreeing to do so, the testator directed as follows:—"I direct that my son *L.* shall pay to them the annual sum of £200, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of £200; and in case all my said daughters shall marry, then the said annual sum shall cease." The testator devised and bequeathed the residue of his property, real, freehold, and personal, to *L.*, subject to payment of his debts, funeral and testamentary expenses, and appointed *L.* his executor. The testator died possessed of freehold and leasehold property, as well as ordinary personalty:—*Held*, that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty. *In re Waring, deceased; Greer* v. *Waring* [V.-C. 427

ANTICIPATION—Clause against—Order under Conveyancing Act, 1881, sect. 39 40
See HUSBAND AND WIFE.

APPEARANCE—Without protest against jurisdiction - - - - 603, 613
See DIVORCE.

APPOINTMENT—Advancement - 143
See ADVANCEMENT.

ARRANGING DEBTOR—*Civil bill decree against—Lodgment with sheriff before protection order—Liberty to levy amount.*] Liberty given to levy the amount of a civil bill decree lodged in the hands of the sheriff before protection order. *In re R. C.* (21 L.R.Ir. 546) applied to a civil bill decree. *In re P. J. W. an arranging debtor.* BANKCY. 44

ARTICLES OF ASSOCIATION—Lien of Company on shares—Notice of equitable rights - - - - 532, 571
See LIEN.

ASSENT—Executor - - - - 401
See EXECUTOR.

AUTHORITY—Agent - - - 520
See COVENANT AGAINST ALIENATION.

BANK—Lien on shares—Trustee—Notice of trust - - - - 532, 571
See LIEN.

BANKRUPTCY—Arranging debtor - 44
See ARRANGING DEBTOR.

—— English Bankruptcy—Trustee—Title of how far impeachable - - 442, 473
See UNCONSCIONABLE BARGAIN.

BEQUEST.
See LEGACY.

BREACH OF COVENANT—Lease—Offensive business - - - - 76, 104
See HOSPITAL.

BREACH OF TRUST—Defect in title—Unauthorised investment - - 18
See TRUSTEE. 2.

CASES—*Blake* v. *Gale* (32 Ch. D. 571) distinguished - - - - 206, 223
See LIMITATIONS, STATUTE OF. 1.

—— *Bolton Partners* v. *Lambert* (41 Ch. D. 295), distinguished - - - - 65
See CORPORATION.

—— *Jackson* v. *Hamilton* (9 Ir. Eq. R. 430), considered - - - - - 494
See ANNUITY. 2.

—— *Kidderminster* (*Mayor, &c. of*), v. *Hardwick* (L. R. 9 Ex. 13), followed - 65
See CORPORATION.

—— *Long* v. *Short* (1 P. Wms. 403) considered [494
See ANNUITY. 2.

—— *Oxford* (*Mayor, &c. of*) v. *Crow* ([1893] 3 Ch. 535) followed - - - - 65
See CORPORATION.

—— *Portuguese Consolidated Copper Mines* (*Limited*), *In re* (45 Ch. D. 16) distinguished - - - - - 65
See CORPORATION.

—— *R. C.*, *In re* (21 L.R.Ir. 546) applied to a civil bill decree - - - - 44
See ARRANGING DEBTOR.

—— *Rancliff* v. *Parkyns* (6 Dow, 149) discussed - - - - - 1
See ELECTION.

CASES—*continued.*

—— *Ridgway* v. *Newstead* (3 De G. F. & J. 474) distinguished - - - 206, 223
See Limitations, Statute of. 1.

—— *Saunders-Davies, In re* (34 Ch. D. 482) followed - - - - - 494
See Annuity. 2.

—— *Ulster Permanent Building Society and Junior Army and Navy Stores* (13 L.R.Ir. 67), distinguished - - - - 520
See Covenant against Alienation.

CHARGE ON LAND—Voluntarily acquired—Merger - - - - - 45
See Merger.

CHARGE ON PROPERTY—Annuity—Agreement to pay "out of first and readiest of means" - - - - 149, 162
See Annuity. 1.

—— Annuity—Charged on real estate only 427
See Annuity. 3.

—— Debentures - - - - 301, 329
See Debentures.

CHARITY—Bequest for masses—Perpetuity
See Masses. 418

CITATION—Dispensing with, on party resident abroad - . - - - 203
See Administration. 1.

CIVIL BILL DECREE—Lodgment with sheriff—Protection order - - 44
See Arranging Debtor.

COLOURABLE SALE—Mortgage—Debentures - - - - - 301, 329
See Debentures.

COMMISSION—Company in possession as mortgagees—Collection of rents by director - - - - - 56
See Mortgage. 1.

COMPANY—Articles of Association—Lien on shares—Notice of equitable rights
See Lien. [532, 571

—— Debentures—Prohibition against creating mortgages in priority to—Colourable sale
See Debentures. [301, 329

—— Mortgagees in possession—Appointment of director to collect rents—Commission
See Mortgage. 1. [56

—— Tramway—Winding up - - 265
See Tramway Company.

—— Winding up—Secured creditor—Receiver
See Winding up. [29

COMPULSORY PURCHASE—Appointment of trustees for purposes of Settled Land Acts—Costs - - - - 507
See Settled Land Acts.

CONDITION SUBSEQUENT—Will—Impossibility of performance - - 418
See Masses.

CONDITIONS OF SALE - - 383, 390
See Power.

CONFIRMATION—Voidable transaction [442, 473
See Unconscionable Bargain.

CONSTRUCTION OF STATUTE—59 & 60 Vict. c. 47, sect. 40 - - - 614
See Land Law (Ireland) Acts.

CONTINGENT GIFT—Will—Construction [295, 301
See Death coupled with Contingency.

CONTINUING PROCEEDINGS—Subsequent costs - - - - - - 142
See Hospital.

CONTRACT—Agent of Corporation—Want of seal - - - - - 65
See Corporation.

CORPORATION—*Contract by agent—No authority under seal—Want of mutuality—Withdrawal—Ratification.*] Though subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, it must be shown in such a case that there was a contract purporting to be made by and with the agent, which if the agent had authority, would be a valid binding contract. At a meeting of a dispensary committee, an agreement in writing for the purchase by them, as agents for the Board of Guardians, from the defendant for £60, of a plot of land for a doctor's residence and dispensary, was signed by the defendant and by the chairman on behalf of the committee. The committee had at the time no authority from the Board of Guardians to contract for the purchase of land. The defendant subsequently withdrew his offer, and refused to carry out the agreement. After such withdrawal and refusal the agreement came before the Board of Guardians, and it was approved by them. Neither the agreement nor the approval was under seal. In a suit by the Guardians for specific performance:—*Held*, that—there being nothing under the seal of the Guardians to give effect to the agreement in the only way in which they could bind themselves—there was not any contract which could be ratified by them, so as to make their approval relate back to the date of the agreement, and thus render the withdrawal by the defendant inoperative; and that the Guardians were not entitled to enforce the agreement. *Mayor, &c., of Kidderminster* v. *Hardwick* (L. R. 9 Ex. 13) and *Mayor, &c., of Oxford* v. *Crow* ([1893] 3 Ch. 535) followed. *Bolton Partners* v. *Lambert* (41 Ch. D. 295) and *In re Portuguese Consolidated Copper Mines, Limited* (45 Ch. D. 16), distinguished. *Athy Guardians* v. *Murphy* - - V.-C. 65

COSTS—Action by receiver in name of owner—Insolvent estate—Implied indemnity
See Receiver. [181

—— Action to set aside deed - - 442, 473
See Unconscionable Bargain.

COSTS—*continued.*

—— Change of parties—Injunction suit - 142
See Hospital.

—— Compulsory purchase—Appointment of trustees for purposes of Settled Land Acts
See Settled Land Acts. [507

—— Security for—Several defendants—Second order - - - - - 60
See Security for Costs.

COVENANT AGAINST ALIENATION—*Without consent in writing of landlord—Consent in letter of agent—Authority of agent—Landlord and Tenant Law Amendment Act (Ireland)*, 1860 (23 *&* 24 *Vict. c.* 154, *s.* 10.] A lease contained a covenant that the lessee should not, without the express consent in writing of the landlord, assign the lands. By settlement on his marriage the lessee purported to assign them to trustees on certain trusts. Evidence was given that previous to the marriage the landlord's agent wrote a letter to the lessee, stating that the agent had got the landlord's consent to allow the place to be settled on the intended wife:—*Held*, that section 10 of the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), applied; and that, as there was no consent testified as required by that section, the settlement was void. *In re Ulster Permanent Building Society and Junior Army and Navy Stores* (13 L. R. Ir. 67) distinguished. *Smith* v. *Whitmore* [V.-C. 520

COVENANT AGAINST TRADE—Private hospital - - - - 76, 104
See Hospital.

COVENANT IN MORTGAGE—Payment of interest by devisee—Liability of personal assets - - - - 206, 223
See Limitations, Statute of. 1.

CY PRÈS—Legacy—Condition subsequent—Impossibility of performance - 418
See Masses.

DEATH COUPLED WITH CONTINGENCY—*Will—Construction—In case both or either of sons die leaving children fatherless, gift to such children—No prior gift to sons—One sum or two—Period of contingency.*] A testator by his will declared that in case of both or either of his sons, *A* or *B*, dying leaving their children fatherless, he left to such children the sum of £500 to be divided amongst them, share and share alike. Both *A* and *B* survived the testator. *A* died, leaving children surviving him. *B* was alive, and had children:—*Held*, that the gift was not limited to one sum of £500, and that the contingency was not confined to death in the testator's lifetime; and accordingly that the children of *A* living at his death were entitled to be paid £500, and that the children of *B* (if any) living at his death would be entitled to a similar sum. *Richardson's Trusts* [V.-C. 295; App. 301

DEBENTURES—*Company—Charge on undertaking and property—Power to deal with property in course of business—Prohibition against creating mortgage in priority to debentures—Colourable sale—Mortgage—Notice—Priority.*] A Distillery Company, with power to create debentures and to borrow on mortgage, issued debentures, and executed a trust deed to further secure the debenture debt. By these documents the undertaking and all the property, present and future, of the Company were charged with the debenture moneys as a first charge thereon. The Company was to be permitted, until default in payment of interest, &c., in the course of its business and for the purpose of carrying on same, to use, sell, or otherwise deal with the mortgaged premises, but so that it was not to be at liberty to create any mortgage or charge on same in priority to or overriding the deed or the debentures, and the latter were to take precedence over all moneys which might be raised by the Company by any means whatsoever. The Company applied to *B* to accept a bill against whisky of the Company in bond, and this transaction was carried out by what purported to be a sale of the whisky to *B*, with a right in the Company to repurchase. The bill was discounted at a Bank, and the whisky was subsequently transferred into the Bank's name in the books of the Company and of the excise authorities. The Court being of opinion, on the evidence, that the transaction amounted to a loan, on the security of the whisky, and that *B* had express notice of the debentures, and that they contained a prohibition of borrowing money on the assets:—*Held* by the Vice-Chancellor, that the transaction came within the restriction against creating any mortgage or charge on the property, and the provision that the debentures should take precedence over all moneys which might be raised by the Company by any means whatsoever; and that *B* was not entitled to hold the whisky as against the debenture holders. The Company being in want of money, two of its directors applied to a Bank to discount bills drawn on the Company by one of the directors in favour of the other, and accepted by the Company. The money was placed to the account of the payee, but it was in a few days drawn out and used by the Company. The bills were several times renewed, but ultimately the Bank, before further renewing, required collateral security. The Company thereupon purported to sell to the directors a quantity of whisky for the amount of the bills; and with the renewals, warehouse warrants for the whisky, describing it as entered in the names of the two directors, and deliverable to them or their assigns by indorsement, and which warrants were indorsed by the directors, were handed to the Bank. Invoices of the whisky, showing that the directors had purchased same from the Company, were also given to the Bank; and

DEBENTURES—*continued.*
subsequently the whisky was entered in the excise books in the names of trustees for them. The Court being of opinion, on the evidence, that the transaction was a plan to create, through a pretended sale to the directors, a mortgage or charge on the whisky having priority over the rights of the debenture holders; that the Bank knew that the money was required for the purposes of the Company; that when the Bank last renewed they had express notice of the existence of the debentures, and that they were in such a form as to preclude the Company from pledging or mortgaging the whisky, or giving it as a security to the Bank; and that the Bank had notice that the transaction was a loan carried out by way of sale. *Held* by the Vice-Chancellor, that the Bank were not entitled to the whisky as against the debenture holders. This decision affirmed on appeal. *In re Old Bushmills Distillery Co.; Ex parte Brydon; Ex parte Bank of Ireland* - - - V.-C. 301; APP. 329

DEBT—Legacy in satisfaction of - - 283
See LEGACY DUTY.

DECREE—Civil bill—Arranging debtor 44
See ARRANGING DEBTOR.

DEPOSIT RECEIPT — *Donatio mortis causâ*
See DONATIO MORTIS CAUSÂ. [148

DEVISE—Specific—Lease accompanied by loan of money - - - - 370
See SPECIFIC DEVISE.

DIRECTOR—Collection of rents by—Company in possession as mortgagees - 56
See MORTGAGE. 1.

DIVORCE—*Petition for—Previous divorce in England of parties domiciled in Ireland—Jurisdiction.*] *A*, a domiciled Irishman, intermarried with *B*, an Irishwoman, at Bombay, India, on March 4th, 1878. There was one child issue of the marriage. In November, 1883, *A* presented a petition for a divorce to the High Court in England, on the ground of *B's* adultery with *C*. *B* did not defend the suit, and on July 15th, 1884, a decree *nisi* was made, and also an order as to the custody of the child. On January 27th, 1885, the decree *nisi* was made absolute. On April 15th, 1886, an order was made, varying the trusts of the settlement executed on the marriage of *A* and *B*. *B* subsequently went through the ceremony of marriage with *C*, and lived with him as his wife. The trustees of the settlement afterwards refused to obey the order of April 15th, 1886, on the ground that *A* and *B* were domiciled in Ireland at the time, and that therefore the English Court had no jurisdiction to entertain the divorce proceedings. On April 7th, 1896, *A* presented a petition for a divorce *a mensa et thoro* to the High Court in Ireland, on the ground of *B's* adultery with *C*, alleging that the English divorce was not binding. The Court was of opinion that the real object of the suit was to enable the petitioner to obtain a private Act of Parliament for the dissolution of the marriage, and, being of opinion that a decree of divorce *a mensâ et thoro* was not a necessary preliminary to such an Act, dismissed the petition. Observations on the practice of appearing without protest against the jurisdiction of the Court. *Sinclair* v. *Sinclair*
[MAT. 603; APP. 613

DOMICIL—English divorce—Subsequent petition in Ireland - - - 603, 613
See DIVORCE.

DONATIO MORTIS CAUSÂ—*Deposit receipt unindorsed.*] Decision of the Vice-Chancellor [1895] 1 I. R. 284, affirmed by Court of Appeal. *Porter* v. *Walsh* - - - - APP. 148

ELECTION—*Will—Intention of testator—Recitals—Scope of will—Applicability of limitations—Onus of proof.*] In considering a question of election raised by the will of a testator the Court must look at the whole scope of the will, with a view to see if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. The question is what was the intention of the testator as gathered from the whole will, seeing the language he has used and what it fairly means. *Prima facie* the Court must construe the words of disposition as applying to an estate which the testator had power to dispose of, if the words will fairly apply to it; and in order to raise a question of election it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another. *Lord Rancliff* v. *Parkyns* (6 Dow, 149) discussed. *Minchin* v. *Gabbett* - - - - M.R. 1

EQUITY OF REDEMPTION—Sale to mortgagee - - - - - 442, 473
See UNCONSCIONABLE BARGAIN.

ESTATE FOR LIFE.
See TENANT FOR LIFE.

ESTATE, PRIVITY OF—Judgment—Estoppel
See SEVERAL FISHERY. [274

ESTATE PUR AUTRE VIE — Executory agreement—Special occupant - 243
See SPECIAL OCCUPANCY.

ESTATE TAIL—*Estate for life—Will—Devise—Gift to children in priority—Sons to inherit before daughters.*] A testatrix left and bequeathed "all the property whether in lands or otherwise" which she might die possessed of to trustees, their heirs and assigns, in trust (after a life estate to her mother who predeceased her)—"To the use of my nephew *W. S.* for his life use, and then to his children in priority in case he marries, the sons to inherit before the daughters; but in case the said *W. S.* my nephew should die unmarried, I leave and bequeath for the use of my cousin, *M.*, her heirs and assigns for ever." The will was made in 1856. *W. S.* married in 1865, and had a son, *J. S.*, and a

ESTATE TAIL—*continued.*
daughter, *B.* The testatrix died in 1892, *M.* having predeceased her. Testatrix died possessed of real and personal estate:—*Held*, that *W. S.* took an estate for life in the real and personal estate of the testatrix, and that *J. S.* took an estate tail in the realty and an absolute interest in the personalty subject to the life estate of his father, *W. S.*—*Held*, also that *B.* was entitled to an estate tail in remainder in the real estate after the estate tail of *J. S.*, with an ultimate remainder to the right heirs of the testatrix. *In re Pennefather, deceased; Savile* v. *Savile* - - - - M. R. 249

ESTOPPEL—Judgment—Question of public interest - - - - - 274
See Several Fishery.

EVIDENCE—Judgment—Privity of estate 274
See Several Fishery.

—— Legacy in satisfaction of debt - 283
See Legacy Duty.

EXECUTION OF WILL—*Probate—Words following signature of testator and attestation clause duly executed—Appointment of executors—Incorporation by reference.*] The will of a testator commenced as follows:—"I give, devise, and bequeath to my trustees and executors hereinafter named all my property whatsoever and wheresoever situate, on trust." The will was signed by testator, and his signature was followed by a regular attestation clause, duly signed by two witnesses. Below the signature and attestation clause were these words:—"I find on reading the above, previous to the execution thereof, that I omitted to name my trustees and executors. I hereby appoint my son and my friend *L.* my executors and trustees." It was proved that the words below the signature were written by testator prior to the execution of the will:—*Held*, that the added words could not be included in probate of the will. *In the Goods of White* - - - - - Prob. 269

EXECUTION, WRIT OF—Civil bill decree—Protection order - - - 44
See Arranging Debtor.

EXECUTOR—*Power of—Assent to legacy—Dealing with assets—Judgment for administration*—Lis pendens.] After a judgment for the administration of personal estate, in an action not registered as a *lis pendens*, the executor of the deceased and the residuary legatee, both of whom had full notice of the action, assigned to a *bona fide* purchaser for value, without notice of the action or judgment, a chattel real, which was part of the assets of the deceased:—*Held*, that the assignment was effectual to vest a good title in the purchaser unaffected by the administration proceedings. *In re Hoban, deceased; Lonergan* v. *Hoban* - - M. R. 401

—— Appointment of - - - - 269
See Execution of Will.

FAMILY—*Will—Construction—"Families"—Substitutionary gift.*] Testator bequeathed his property to his wife for her life, and after her death "unto his brothers and sisters in equal shares and proportions, or unto the families of such of them as shall be then dead." All his brothers and sisters died in the lifetime of testator's widow, leaving sons and daughters and also grandchildren:—*Held*, (1) that "families" did not include grandchildren; (2) that the sons and daughters of testator's brothers and sisters took *per stirpes*; (3) that the words "in equal shares" applied only to the gift to testator's brothers and sisters, and could not be extended to the substitutionary gifts, and that therefore the children of each brother and sister took as joint tenants *inter se*. *In re Battersby's Trusts* - - - - - V.-C. 600

FEE-FARM RENT—Redemption—Registration of title - - - - 285
See Redemption of Rent.

FISHERY.
See Several Fishery.

FRAUDULENT DISPOSITION—10 Car. 1, sess. 2, c. 3—Merger 45
See Merger.

GRAFT—*Married woman—Sale of interest in leasehold—No deed acknowledged—Expiration of lease—Statutory tenancy—Circumstances disentitling to enforce equity.*] A married woman, entitled under her marriage settlement to an equitable life estate, in remainder expectant on her husband's death, in a leasehold for years, joined her husband, though not by deed acknowledged, in selling the lands. She took an active part in the sale and the application of the purchase-money, portion of which she herself received and retained. Her husband died in 1886. The lease expired in 1889; and in 1891, on the application of the purchaser's administratrix, who continued in possession, a fair rent was fixed. In 1894 the widow, alleging that the sale was void as against her, brought an action to have the statutory tenancy declared a graft on the leasehold interest, and subject to the trusts of the settlement. She made no offer to return the purchase-money:—*Held*, that the widow was not, under the circumstances, entitled to enforce the equity claimed. *Smith* v. *Whitmore* - V.-C. 520

HOSPITAL—*Lease—Covenant not to carry on certain businesses, "or any other offensive or noisy trade, business, or profession whatsoever"—Private hospital—Injunction—Practice—Change of parties—Costs.*] A lease made in 1822 of a plot of ground on one side of Fitzwilliam-square (then partly built) in the city of Dublin, for the enclosing, ornamenting, and maintaining of which Square Commissioners had been appointed by Act of Parliament, contained covenants by the lessee to build dwelling-houses of a superior class according to the descriptions in the lease, and that the ground

HOSPITAL—*continued.*

called Fitzwilliam-square should be preserved as a square and laid out as a pleasure ground only. It also contained a covenant not to use any part of the front of the house as a shop, or carry on therein or on any part of the demised premises the business of a tavern, ale-house, soap-boiler, chandler, baker, butcher, distiller, sugar-baker, brewer, druggist, apothecary, tanner, skinner, lime-burner, hatter, silversmith, coppersmith, pewterer, blacksmith, or any other offensive or noisy trade, business, or profession whatsoever. A sub-lessee opened what the plaintiff called a private or home hospital, but what she described as a residence for herself and persons coming to town for medical advice or to undergo treatment. The Commissioners of the Square and the great majority of the residents objected to this and called on the head landlord to prevent it. On a motion for an interlocutory injunction, evidence was given that such a business would cause great annoyance and would be a source of danger to the other inhabitants of the square and would greatly depreciate the value of the property. Evidence for the defendant went to show that the only persons admitted were patients requiring surgical operations or to be treated medically, and who were sent by their own surgical or medical advisers; that persons suffering from infectious diseases were not received, and that there was no danger from infection:—*Held*, by the Vice-Chancellor, that the *ejusdem generis* rule did not apply, and that the concluding general words of the covenant were not to be confined to businesses of a similar nature to those enumerated; that in construing the covenant the nature and purpose of the letting, and the nature of the locality should be taken into account; that the word "offensive" had no definite legal meaning, that it was not to be restricted to what was unpleasant to the eye, ear, or nose, that it should be interpreted *secundum subjectam materiem*, and that it meant causing well-founded and reasonable annoyance. And the Court being satisfied on the evidence that the great body of the tenants of houses in the square were offended by the opening of the hospital, *held*, that there had been a breach of the covenant which should be restrained by an interlocutory injunction. On appeal, *held*, by Sir P. O'Brien, L.C.J., and Walker, L.J. (Fitz Gibbon, L.J., *diss.*), that having regard to the locality, and to the circumstances under which the lease was granted, a private hospital was offensive within the meaning of the covenant:—*Held*, by Fitz Gibbon, L.J., that a private hospital was not necessarily, or *per se*, offensive within the meaning of the covenant, and that an interlocutory injunction ought not to be granted. Pending the action the plaintiff died, and an order was made on the application of his devisee that the proceedings should be continued in the name of the latter. The defendants ultimately submitted to a perpetual injunction. The Vice-Chancellor, in awarding same with costs, *held*, that such costs should include those incurred prior to the death of the original plaintiff. *Pembroke and Montgomery (Earl of) v. Warren* V.-C. 76; App. 104; V.-C. 142

HUSBAND AND WIFE—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *sect.* 39—*Married woman—Restraint on anticipation—Order binding her interest in fund appointed to son with her consent.*] Restraint on anticipation of personalty settled by a married woman on herself for life, with remainder to her husband for life, was removed, so as to allow a sum of £500, which she and her husband had appointed to their son, the only child of the marriage, free from the husband's contingent life interest, but subject to her life interest, to be raised by the trustees of the settlement, and expended in buying cattle and implements of husbandry for the purpose of starting the son as a practical farmer, and relieving the husband and wife of the expense of maintaining him. *In re Sawyer's Trusts* - - M. R. 40

—— Agreement to pay wife annuity "out of first and readiest of means"—Charge—Jointure, whether performance 149, 162
See Annuity. 1.

—— Alimony—Increase of—Support of children by wife - - - - 244, 248
See Alimony.

—— Assignment of chattel real—Joint tenancy
See Joint Tenants. [401

—— Divorce - - - - - 603, 613
See Divorce.

—— Sale of leasehold—Unacknowledged deed—Graft - - - - - - 520
See Graft.

INDEMNITY—Owner of insolvent estate—Costs of proceedings taken in his name by receiver - - - - - 181
See Receiver.

INFANT—Grant of administration to guardian [203
See Administration. 1.

—— Term of years—Administrator *durante minore ætate*—Sale - - - 356, 362
See Administrator.

INJUNCTION — Lease — Breach of covenant [76, 104
See Hospital.

INSOLVENT ESTATE — Proceedings taken by receiver in owner's name—Costs 181
See Receiver.

—— Sale in Land Judge's Court—Land Law (Ireland) Act, 1896, sect. 40 - - 614
See Land Law (Ireland) Acts.

INTENTION—To merge - - - 45
See Merger.

INTEREST—In proper investment by trustee—Acquiescence of tenant for life 340, 345
See Trustee. 1.
—— Payment by devisee of mortgagor 206, 223
See Limitations, Statute of. 1.

INVESTMENT—Trust funds—Defect of title—Unauthorized security. - - 18
See Trustee. 2.
—— Trust funds—Improper investment—Acquiescence of tenant for life—Interest 340, [345
See Trustee. 1.

JOINT TENANTS—*Assignment of chattel real—Husband and wife—Joint tenancy—Severance.*] By a paper writing, not under seal, executed on the marriage of *A* with *B* in 1855, reciting an agreement by *A's* father, *C*, to make over to *A*, *C's* right, title, and interest in a certain farm, held for a chattel term, in consideration of *B's* fortune, it was witnessed that *C*, who was an executing party to the document, "covenanted and agreed with *A* that he (*C*) did thereby grant and assign to *A* and *B*" the said farm, to hold the same to the said "*A* and *B*, their heirs, executors, administrators, and assigns," for the residue of the term:—*Held*, 1st, that the instrument passed an immediate interest in the farm to *A* and *B* as joint tenants; 2ndly, that *A*, the husband, not having disposed of the farm during the coverture, the joint tenancy was not severed, and that, on the death of *A*, *B*, who survived him, became solely entitled to the farm. *In re Hoban (deceased); Lonergan* v. *Hoban* - - - - M. R. 401
—— Will—Substitutionary gift - - 600
See Family.

JOINTURE—Agreement to pay annuity "out of first and readiest of means"—Performance - - - - 149, 162
See Annuity. 1.

JUDGMENT—Privies in estate—Estoppel 274
See Several Fishery.

JUDICATURE ACT—S. 28 (1)—Secured creditor - - - - - 29
See Winding up.

JURISDICTION—Service out of - 334
See Service out of the Jurisdiction.
—— Submission to - - - 603, 613
See Divorce.

LACHES - - - - - - 206, 223
See Limitations, Statute of. 1.

LAND LAW (IRELAND) ACTS—*Sale, Land Judge's Court—Land Law (Ireland) Act*, 1896 (59 & 60 *Vict. c.* 47), *sect.* 40 (1)—*Receiver—Solvent and insolvent estates—Practice.*] Sect. 40, sub-sect. (1) of the Land Law (Ireland) Act, 1896, is mandatory on the Land Judge in all cases that fall within its scope. These are lands agricultural or pastoral, or partly agricultural or partly pastoral, in the occupation of tenants (*a*) where a receiver has been appointed; (*b*) where the estate is insolvent. The sub-section does not apply to solvent estates over which no receiver has been appointed. *In re Grogan's Estate* - - Ross, J. 614

LANDLORD AND TENANT—Lease.
See Lease.
—— Proposal by tenants to purchase—Non-payment of rent—Lapse of time - 191
See Limitations, Statute of. 3.
—— Redemption of fee-farm rent—Registration of title - - - - - 285
See Redemption of Rent.

LEASE—Accompanied by loan of money—Option to purchase—Residue—Specific devise of demised premises - 370
See Specific Devise.
—— Covenant against alienation—Consent—Agent—Authority - - - 520
See Covenant against Alienation.
—— Covenant against trade—Private hospital
See Hospital. [76, 104
—— Joint tenancy—Assignment—Husband and wife - - - - - 401
See Joint Tenants.
—— Statutory tenancy—Graft—Void sale by married woman - - - 520
See Graft.
—— Term of years—Administrator *durante minore ætate*—Sale - - - 356, 362
See Administrator.

LEGACY—Assent - - - - - 401
See Executor.
—— Condition subsequent—Impossibility of performance—Perpetuity - - 418
See Masses.
—— Contingent - - - - 295, 301
See Death coupled with Contingency.
—— Erroneous recital in codicil—Residue 331
See Residuary Gift.
—— Misdescription—Railway shares—Stock 418
See Masses.
—— Satisfaction of debt—Evidence - 283
See Legacy Duty.

LEGACY DUTY—*Legacy in satisfaction of debt—Evidence.*] A statement in a will that a legacy is bequeathed in satisfaction of a debt is sufficient *prima facie* evidence of the testator's indebtedness to exempt the legacy from duty. *In re O'Leary's Estate* - - - - Madden, J. 283

LIEN—*Company—Articles of association—Companies Act*, 1862, *s.* 30—*Shares standing in name of trustee—Notice of equitable rights—Debt owing by trustee.*] *B.* was entitled, in her own right, to shares in a bank, of which she was the registered holder. In 1877 she married *R.*, and by her marriage settlement purported to convey the shares to *C.* and *D.* as trustees, upon usual trusts. After the marriage, *C.*, as one of the trustees, wrote to the secretary of the bank, informing him of *B.*'s marriage, of the marriage settlement, and asking that the shares might be transferred into the joint names of the trustees. The secretary wrote in reply, pointing out that owing to the regulations of the bank the shares could not be transferred into joint names, and that the bank could not take notice of any trust. There was some correspondence on the subject. In 1882 the bank was incorporated under the Companies Act of 1862. Clause 8 of the articles of association provided that no person should be recognized by the Company as holding any share upon any trust, and that the Company should not be bound by or recognize any equitable interest in any share, or any other right in respect of any share, except an absolute right to the entirety thereof in the registered holder. Clause 11 provided that the Company should have a first and paramount lien and charge on all the shares registered in the name of a member (whether solely or jointly with others) for all moneys due to the Company from him, or his estate, either alone or jointly with any other person, whether a member or not, and whether such shares were presently payable or not. After the incorporation of the Company (as it was then permissible) the shares were transferred into the joint names of the trustees, such transfer being made in 1885, after some further correspondence between the trustee *C.* and the secretary of the bank. Both before and after incorporation the bank had notice that *C.* and *D.* were trustees in respect of the shares, that the shares had been put in settlement, and that neither of the trustees had any beneficial interest therein. From 1885 the dividends on the shares were paid to the husband *R.*, as the nominee of the trustees, till his death in 1888. From that date till August, 1892, they were by arrangement paid to *B.* In 1891 *D.* became indebted to the bank, and left the country in that year. *C.* died in 1893. The bank claimed to hold the shares answerable for *D.*'s debt, and refused to pay any further dividends on the same till the debt was discharged:—*Held*, by the Master of the Rolls and the Court of Appeal that the bank were not entitled to a lien on the shares in respect of *D.*'s debt. *Per* Porter, M.R.: The object of section 30 of the Companies Act of 1862, and of similar provisions in articles of association, is to spare a company the responsibility of attending to any trusts or equities whatever attached to their shares, so that they may safely deal with the person who is registered owner, recognizing no other person and no different right, and freeing them from inquiry into conflicting claims as to shares, transfers, calls, dividends, &c., and enabling them to treat the registered holder as owner of the shares for all purposes, without regard to contracts between himself and third persons. But it was not the object of the Legislature to enable a company to ignore, for their own purposes and interest, the rights of persons of which they have knowledge. *Per* Palles, C.B.: The effect of the section is to relieve companies from liability arising, not from the joint operation of notice and an act or omission of the Company, but from notice *per se*; and not to extinguish or affect any obligation to which they would otherwise be subject by their own unconscientious conduct. *Rearden* v. *Provincial Bank of Ireland* - - - M. R. 532; App. 571

LIMITATIONS, STATUTE OF—*Following assets—Claim by mortgagee against devisees and residuary legatees—Trustee Act*, 1888 (51 *&* 52 *Vict.* *c.* 59, *s.* 8)—*Acquiescence—Lapse of time.*] A testator in the year 1855 mortgaged certain freehold lands of which he was absolute owner, and also his life estate in other freehold lands, to secure repayment of a sum of £3109, advanced by the mortgagees, who were trustees of a marriage settlement, with interest at the rate of five per cent. per annum. The testator died in 1862, having by his will devised the mortgaged lands to his son *A* for life, with remainder to his first and other sons in tail male; and other freehold lands to his son *B* in like manner, and bequeathed his residuary personal estate to his executors upon trust for his daughters. The mortgagees were aware of the death of the testator, but did not require payment of the mortgage debt. The executors paid the debts of the testator (other than the mortgage debt) and converted into money and set apart the residuary personal estate for the benefit of the residuary legatees. Part was afterwards paid over to them, and the remainder was invested by the executors, and the income paid to the residuary legatees. Two of the daughters married, and their shares of the residue were put in settlement. Interest on the mortgage was paid by the devisee of the mortgaged lands down to 1886, when it fell into arrear, and a receiver was appointed. In 1890 an order for sale of the lands was made on the petition of the mortgagees, which proceedings were pending in 1891 when the mortgagees, believing that the lands when sold would not realise sufficient to satisfy their claim for principal and interest, brought an action to administer the real and personal estate of the deceased mortgagor and claimed the right to follow the assets remaining in the hands of the

LIMITATIONS, STATUTE OF—*continued.*
surviving executor as trustee for the residuary legatees, or which had been paid over by him to them. No interest had been paid to the mortgagees since the death of the testator except by the devisee of the mortgaged lands. The defendants pleaded (1) the Statute of Limitations; (2) The Trustee Act, 1888, s. 8; and (3) laches and acquiescence:—*Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls); (1) that the payment of interest by the devisee of the mortgaged lands kept alive the right of the plaintiffs to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the lands being insufficient, and that therefore the Statute of Limitations did not apply; (2) that the residuary legatees were not persons "claiming through a trustee" within the meaning of the Trustee Act, 1888, sect. 8; *Held* (3), by the Court of Appeal (reversing on this point the decision of the Master of the Rolls) that there were no special circumstances or action or conduct on the part of the plaintiffs to disentitle them to follow the assets, and that they were entitled to the relief sought. *Ridgway* v. *Newstead* (3 D. F. J. 474), and *Blake* v. *Gale* (32 Ch. D. 571), distinguished. *Leahy* v. *De Moleyns* - - M. R. 206; App. 223

2. —— *Mortgage—Non-payment of interest and no acknowledgment—Action for recovery of land—"Present right to receive"—Tenant for life and remainderman—Power to give receipt—Trustees—3 & 4 Wm. 4, c. 27, ss. 2, 24, 40—37 & 38 Vict. c. 57, ss. 1, 2, 8.*] If interest is not paid on a mortgage for a period exceeding the statutory period to a person who is tenant for life of the estate of the mortgagee, this will not bar the remainderman. But the remainderman is barred by nonpayment of interest for twelve years, if the mortgagee's estate is vested in trustees, with full powers of converting and realizing the mortgage debt, and with power of giving receipts, even though the trustees only hold the moneys, when realized, on trust to pay the interest to a tenant for life, and afterwards for the remainderman. *Barcroft* v. *Murphy* - - - - M. R. 590

3. —— *Proceedings for sale in Land Judge's Court—Lapse of time—No rent paid—Proposal by tenants to purchase—Failure of proceedings to purchase.*] A petition for sale had been filed in 1876, and the conditional order was made absolute on the 31st January, 1877. In 1879 the lands were put up for sale, but £900 only being bid, the offer was not accepted. On the 24th April, 1884, an order was made on the application of the first incumbrancer for a receiver. On the 18th July, 1884, *J. H.* was appointed receiver, and on the 8th November, 1884, an order was made on the tenants to pay their rents to the receiver. *J. H.* died in 1885, and on the 2nd June, 1885, *J. H.* (junior) was appointed in his stead. He died in 1888, and neither of these receivers had collected any rent. In 1886 and 1887 negotiations were entered into with the tenants to purchase their holdings through the Land Commission, and they were declared purchasers for purchase-money, amounting in the whole to £582. The boundaries and rights of way were fixed by the tenants *inter se* by agreement, and the headrent and tithe rentcharge were apportioned by consent, but nothing further was done to carry out the sale. On the 7th December, 1891, the Land Commission, to whom arrears of tithe rentcharge were due, obtained an order, appointing *J. R. B.* receiver, and on the 20th May, 1892, an order was made on the tenants to pay their rents to the receiver. Actions for rent were brought by order of the reeceiver Judge against six of the tenants, who all filed defences, pleading that they were not tenants and the Statute of Limitations. One of them, *D.*, obtained a verdict and judgment on the former defence. An application was then made to the Land Judge for an order that the tenants should complete their contracts to purchase. The tenants declined to forego the plea of the Statute of Limitations:—*Held* (reversing the decision of Madden, J.), that the tenants should complete their contracts to purchase. *In re Slacke's Estate; Slacke, Petitioner*, No. (2) - App. 191

—— Trustee—Improper investment—Acquiescence by tenant for life—Interest—Extent of liability - - - - 340, 345
See Trustee. 1.

LIS PENDENS—Administration suit—Assent of executor—Dealing with assets - 401
See Executor.

LOAN—Accompanying lease—Option to purchase—Specific devise - - - 370
See Specific Devise.

LOCAL REGISTRATION OF TITLE ACT—Fee-farm rent - - - - 285
See Redemption of Rent.

MARRIED WOMAN.
See Husband and Wife.

MASSES—*Will—Legacy—Condition subsequent—Charitable uses—Perpetuity—Impossibility of performance—*Cy près *doctrine—Railway "shares"—Railway "stock"—Misdescription.*] A testator made the following bequest:—"I give and bequeath to *M.* or the parish priest for the time being of St. Peter's Roman Catholic parish, Drogheda, towards building the Oliver Plunkett Church, two ordinary shares in the Great Northern Railway Company of Ireland, with an obligation that in consideration thereof the parish priest and curates for the time being of St. Peter's Roman Catholic parish, Drogheda, shall celebrate mass in public in the C. Church on each Monday morning for the

MASSES—*continued.*
repose of my soul and the souls of the deceased members of my family." *M.* refused to take the legacy on the condition attached to it by testator, and stated it would be impossible to carry out this condition consistently with the due discharge of his other duties as parish priest. *C.* was a mortuary chapel adjoining Drogheda. The Great Northern Railway Company never had "shares," but "stock" only. An affidavit was made by a member of the Stock Exchange, stating that £100 stock was often referred to as one share by members of the public, and that he himself would have no hesitation in reading an order to buy or sell "two ordinary shares" as £200 stock, and that, to his mind, it would bear no other interpretation:—*Held*, that it was reasonably clear that the testator meant to bequeath £200 stock under the bequest of "two ordinary shares," and that the legacy passed to *M.* discharged from the condition of celebrating masses. *Held*, that the obligation to celebrate masses in the C. Church was a condition subsequent, and being an attempt to create a perpetuity for a purpose which was not charitable, was wholly void. *Held*, also, that the condition being impossible of performance without violation by the legatee of his duties as parish priest, was in law an impossible condition. *Brannigan* v. *Murphy* M. R. 418

MERGER—*Tenant for life—Merger of charge voluntarily acquired—Intention—Disposition fraudulent against creditors*—10 *Car.* 1, *sess.* 2, *c.* 3.] A mortgage affecting the fee of settled lands having being bequeathed to the tenant for life, he, while in solvent circumstances, evidenced an intention to merge the mortgage debt in the inheritance. There was no evidence of any contrary intention during the remainder of his life. At his death he was insolvent:—*Held*, that a merger of the charge took place as of the earliest date to which, upon the evidence, the intention to merge was referable. *Semble*, merger of a charge by expression of intention is a disposition of property within the 10 Car. 1, sess. 2, c. 3 (Ir.), and would be void and inoperative, if fraudulent, as against creditors. *Query.* Can a disposition of property be impeached as fraudulent under the statute at suit of the personal representative of the person by whom such disposition was made, even when acting under a judgment of the Chancery Division in an administration action, directing the asset so disposed of to be realised for the benefit of the creditors? *Query.* Is an unequivocal expression of intention by the tenant for life to merge a charge in the fee revocable? *In re Godley's Estate; Godley (Executrix of), Petitioner.* [Madden, J., 45

MISDESCRIPTION—Shares—Stock - 418
See Masses.

MORTGAGE—*Mortgagee in possession—Collecting rents—Commission—Joint Stock Company—Appointment of a director as agent.*] The defendants, who were mortgagees of two houses at *C.*, in the county of Dublin, went into possession as mortgagees, and appointed *M.*, one of their directors, to collect the rents as their agent:—*Held*, that he could not be allowed any commission out of the rents. *Kavanagh* v. *Workingman's Benefit Building Society* - - App. 56

2. —— *Will—Construction of—"All my estate and interest in the lands of A."—Beneficial interest in mortgage belonging to testator held to pass.*] A testator being possessed of a fee-simple estate in the lands of *A.*, and also being beneficially entitled to a sum of money secured thereon by mortgage, devised all his estate and interest in the lands of *A.* to his son *W.* for life, with remainder to his first and other sons in tail male; and in default of issue of his son *W.*, to his son *G.* for life, with remainder to his first and other sons in tail male, with remainder over; and devised and bequeathed the residue of his property to his son *W.*:—*Held*, that the beneficial interest in the mortgage-money passed under the specific devise of the lands. *Mackesy* v. *Mackesy* - - - M. R. 511

—— Claim against devisees and residuary legatees—Following assets—Statute of limitations—Acquiescence - - 206, 223
See Limitations, Statute of. 1

—— Prohibitions against creating—Colourable sale - - - - 301, 329
See Debentures.

—— Redemption suit—Offer to redeem—Sale of equity of redemption to mortgagee [442, 473
See Unconscionable Bargain.

—— Vested in trustees with power to give receipts—Equitable tenant for life and remainderman—Statute of limitations, - 590
See Limitations, Statute of. 2.

NOTICE—Equitable rights—Company—Articles of association—Lien - 532, 571
See Lien.

OPTION OF PURCHASE—Lease—Specific devise - - - - - 370
See Specific Devise.

—— Sale, Land Judge's Court—Land Law (Ireland) Act, 1896, s. 40 - - 614
See Land Law (Ireland) Acts.

ORDERS, GENERAL, 1891 (19th Jan.), XI. R. 1 - - - - - 334
See Service out of the Jurisdiction.

ORIGINATING SUMMONS.
See Summons.

PERPETUITY—Bequest for masses - 418
See Masses.

PLEADING—Redemption suit—Offer to redeem —Amendment - - - 442, 473
See UNCONSCIONABLE BARGAIN.

POWER—*Vendor and purchaser—Conditions of sale—Title—Will—Gift by implication—Release of testamentary power—Derogating from grant—Vendor and Purchaser Act*, 1874 (37 *&* 38 *Vict. c.* 78), *s.* 9—*Return of deposit.*] By his will, dated May 25th, 1875, a testator devised premises, to which he was entitled in remainder in fee simple expectant on the determination of a life estate, subject to that life estate, to his four sisters (one of whom was the vendor) as their sole and separate property, and provided that in the event of any of his sisters dying, her share should be divided among the survivors; and by a codicil to his said will he directed that each of his said four sisters should have power to leave by will amongst any child or children they might have, any property they might derive under his said will or codicil, and that in default of issue or such will same should revert to the survivors. One of the four sisters predeceased the tenant for life, leaving issue, but without having made any will. After the death of the tenant for life, by an indenture dated September 25, 1883, two of the surviving sisters and their respective husbands conveyed to the third sister (the vendor) all the estate, right, title, and demand of each of them respectively, to hold in fee simple. The vendor set the premises up for sale by auction, describing them in the particulars as being held in fee simple, and stating the facts above mentioned in the conditions of sale. One of the conditions bound the purchaser to admit that after the deaths of the tenant for life and the deceased sister the entire interest in the premises became vested in the surviving sisters, and that the conveyance of September 25, 1883, vested in the vendor a good title to the premises for an estate in fee simple. The condition did not state, though the fact was so, that one of the surviving sisters who had conveyed to the vendor had children living, nor did it state that it was the contention of the vendor that the conveyance by the sisters operated as a release of the testamentary power of appointment given them by the will and codicil. The purchaser objected that a good title was not shown by the vendor, that under the will and codicil the sisters only took life estates with a power of appointment amongst their children, and that the condition binding the purchaser to admit that the vendor had vested in her an estate in fee simple was bad and misleading, and issued a summons, asking for a declaration that title had not been shown by the vendor, and for the return of the deposit paid to the vendor:—*Held*, by the Vice-Chancellor, that the condition was good and binding, and that a good title within the condition was shown, and that the summons should be dismissed with costs. *Held*, by the Court of Appeal, that there was no implied gift to the children of the sisters of the testator; that on the death intestate of the deceased sister the gift over to the survivors took effect; that the testamentary power of appointment given by the codicil to the survivors was capable of being released, and that it was released or extinguished by the conveyance, and that therefore a good title was shown by the vendor. *Per* Lord Ashbourne, C.: The condition was not misleading. *Per* FitzGibbon, Barry, and Walker, L.JJ.: the condition was not binding. *Per* Lord Ashbourne, C., and Barry, L.J.: Where, as the natural consequence of the order of the Court on a summons made under the Vendor and Purchaser Act, 1874, it would be just to order the return of the deposit to the purchaser, the Court has jurisdiction so to order. The vendor, though held to have shown good title to the premises, having in the Court below relied solely on the conditions, and refused to argue the question of title:—*Held* by the Court of Appeal, that he should be awarded no costs, either in the Court below or of the appeal. *In re Lyons and Carroll's Contract* - - - V.-C. 383; APP. 390

—— Execution of—Advancement - - 143
See ADVANCEMENT.

PRACTICE, CHANCERY DIVISION—Amendment—Pleading - 442, 473
See UNCONSCIONABLE BARGAIN.

—— Change of parties—Continuing proceedings—Costs - - - - - - 142
See HOSPITAL.

—— Land Judge—Costs of proceedings in name of owner—Indemnity - - - - 181
See RECEIVER.

—— Land Judge—Failure of tenant to carry out proposal for purchase—Non-payment of rent—Lapse of time - - - 191
See LIMITATIONS, STATUTE OF. 3.

—— Land Judge—Sale—Land Law (Ireland) Act, 1896, s. 40 - - - - 614
See LAND LAW (IRELAND) ACTS.

—— Land Judge—Sale—Several Fishery—Title by user - - - - - 274
See SEVERAL FISHERY.

—— Land Judge—Vendor and vendee—Tenant for life—Petition for sale - - 273
See TENANT FOR LIFE.

—— Security for costs—Several defendants—Second order - - - - - 60
See SECURITY FOR COSTS.

—— Service out of the jurisdiction - 334
See SERVICE OUT OF THE JURISDICTION.

—— Substitution of service—Affidavit—British subject - - - - - 416
See SUBSTITUTION OF SERVICE.

PRACTICE, PROBATE AND MATRIMONIAL DIVISION—Administration—Grant to guardian of infant—Citation on party resident abroad dispensed with - - - - 203
See ADMINISTRATION. 1.

—— Alimony—Increase of—Support of children by wife - - - - 244, 248
See ALIMONY.

—— Divorce—Granted in England where parties were domiciled in Ireland—Appearance without protest—Subsequent petition in Ireland - - - - 603, 613
See DIVORCE.

—— Limited administration—Trust term 200
See ADMINISTRATION. 2.

PRE-EMPTION—Lease with option of purchase—Specific devise of demised premises
See SPECIFIC DEVISE. [370

—— Tenants' right of—Land Law (Ireland) Act, 1896, s. 40 - - - - 614
See LAND LAW (IRELAND) ACTS.

PRIORITY—Company—Debentures 301, 329
See DEBENTURES.

PRIVATE HOSPITAL - - 76, 104
See HOSPITAL.

PROBATE—Appointment of executors 269
See EXECUTION OF WILL.

RAILWAY—Shares—Stock—Legacy—Misdescription - - - - - - 418
See MASSES.

RATIFICATION—Contract by agent for corporation - - - - - - 65
See CORPORATION.

RECEIVER—*Insolvent estate—Owner entitled by descent, but having abstained from taking possession—Receiver appointed by Land Commission on foot of arrears of tithe rentcharge—Costs of abortive proceedings against tenants to recover arrears of rent—Implied undertaking to indemnify.*] An incumbrancer upon an insolvent estate, having obtained an order for the appointment of a receiver, two receivers were successively appointed at his instance, neither of whom collected any rents, and both died. Some years afterwards the Land Commission, upon foot of their claim for tithe rentcharge, obtained an order for the appointment of a third receiver. The owner having died, the estate descended on his heir-at-law, who never went into possession, or interfered with the estate. The newly-appointed receiver, by leave of the Court, brought an action against a tenant for rent in the name of the owner, without having obtained his consent. The tenant filed a defence, pleading that he was not the tenant and the Statute of Limitations, and obtained a verdict on the former defence, upon which judgment was entered in his favour. He issued execution for his costs against the owner, who was compelled to pay the amount:—*Held* (varying the decision of Madden, J.), that the owner was entitled to be indemnified in the first instance out of the estate, and, failing that, by the person who had used his name without his authority. *In re Slacke's Estate; Slacke, Petitioner* (*No.* 1)
[APP. 181

—— Appointment of—Secured creditor—Winding up - - - - - - - 29
See WINDING UP.

—— Appointment of—Statutory remedy—Winding up - - - - - - - 265
See TRAMWAY COMPANY.

—— Sale in Land Judges Court—Land Law (Ireland) Act, 1896, sect. 40 - 614
See LAND LAW (IRELAND) ACTS.

RECITAL—Erroneous—Will—Codicil—Construction - - - - - - 331
See RESIDUARY GIFT.

RECTIFICATION OF DEED.
See REFORMATION OF DEED.

REDEMPTION OF RENT—*Local Registration of Title* (*Ireland*) *Act*, 1891, *sect.* 22—*Redemption of Rent* (*Ireland*) *Act*, 1891, *sect.* 1—*Redemption of fee-farm rent.*] The Redemption of Rent (Ireland) Act, 1891, is a "Purchase of Land (Ireland) Act" within the meaning of sect. 22 of the Local Registration of Title (Ireland) Act, 1891, and the redemption of a fee-farm rent is a sale of "land" within the meaning of the same statute. *Keogh, Grantor; Kettle, Grantee* - - - MADDEN, J., 285

REDEMPTION SUIT—Offer to redeem—Pleading—Amendment - - 442, 473
See UNCONSCIONABLE BARGAIN.

REFORMATION OF DEED—*Voluntary deed—Death of Settlor.*] The Court will rectify a voluntary deed after the death of the donor where it is clearly shown that, through mistake, the deed failed to carry out the proved intention of the donor. *M'Mechan* v. *Warburton*
[V.-C. 435; APP. 441

REGISTRATION OF TITLE—Redemption of fee-farm rent - - - - 285
See REDEMPTION OF RENT.

RELEASE—Testamentary power - 383, 390
See POWER.

RENT—Redemption of—Registration of title
See REDEMPTION OF RENT. [285

RENTCHARGE.
See ANNUITY.

RESCISSION—Contract by corporation not under seal - - - - 65
See CORPORATION.

RESIDUARY GIFT—*Will—Codicil—Erroneous recital—Particular residue.*] Testator, by a codicil, erroneously recited that he had already disposed of part of one portion of his property by his will, and gave the residue of this portion to a legatee:—*Held*, that the entire of this portion passed to the legatee, and did not fall into the general residue. *Bergin* (*deceased*) ; *Langan* v. *Bergin* [V.-C. 331

—— Lease with option of purchase—Specific devise of demised premises - 370
See SPECIFIC DEVISE.

REVENUE—Legacy in satisfaction of debt—Evidence - - - - 283
See LEGACY DUTY.

SALE—Conditions of—Whether misleading
See POWER. [383, 390

—— Leasehold—Married woman—Unacknowledged deed - - - - 520
See GRAFT.

—— Reversion—Sale of equity of redemption to mortgagee—Unconscionable bargain [442, 473
See UNCONSCIONABLE BARGAIN.

—— Term of years—Administrator *durante minore œtate* - - - - 356, 362
See ADMINISTRATOR.

—— Under colour of mortgage - 301, 329
See DEBENTURES.

SALE, LAND JUDGE—Land Law (Ireland) Act, 1896, sect. 40 - - - 614
See LAND LAW (IRELAND) ACTS.

SATISFACTION OF DEBT—Legacy 283
See LEGACY DUTY.

SEAL—Contract by corporation - - - 65
See CORPORATION.

SECURITY FOR COSTS—*Practice—Plaintiff residing out of the jurisdiction—Several defendants—Second order for security for costs.*] The plaintiff, who resided in America, brought an action against *W. M.*, *N. M.*, *D. M.*, and *R. M.*, for the purpose of having himself declared heir-at-law of *J. H.* The first three defendants were sued as trustees of the will of *J. H.*, and the fourth had been found to be the heir in a former proceeding. On the 17th June, 1895, the first three defendants, the trustees of the will, obtained an order that the plaintiff should give security for costs, which was measured at £75. *R. M.*, the fourth defendant, who appeared by a separate solicitor, obtained an order on the 23rd July, 1895, that the plaintiff should give security for his costs:—*Held* (varying the order of the Vice-Chancellor), that, in the absence of special circumstances, one sum of £75 was sufficient security for the costs; that *R. M.* was not entitled to a second order for security for his costs, but that the sum of £75 lodged under the order of the 17th June, 1895, should stand security as well for the costs of *R. M.* as of the other defendants. *M'Henry* v. *M'Henry* - - - - - APP. 60

SERVICE OUT OF THE JURISDICTION—*Practice—Originating summons—General Order XI., R. S. C.* (*Ireland*), 1891—*Jurisdiction.*] By marriage settlement executed in Ireland landed property in Dublin was vested in trustees upon certain trusts. The settlement contained a power of appointment in favour of the children of the marriage. Personalty outside the jurisdiction subsequently became vested in the trustees, subject to the trusts and provisions of the settlement, and was, by deed poll executed in England, appointed by the husband and wife in favour of two of the children of the marriage. One of the trustees residing in Ireland brought an originating summons to have it determined whether the appointment was a valid exercise of the power or not. The other trustee, and all the children of the marriage whose addresses were known, were named as defendants. They all resided in England. The beneficiaries under the settlement applied to set aside an order giving liberty to issue and serve the originating summons on them in England:—*Held*, that the Court had power to allow service out of the jurisdiction. *In re Stubbs* : *Russell* v. *Lebert* [M. R. 334

SERVICE, SUBSTITUTION OF - 416
See SUBSTITUTION OF SERVICE.

SETTLED LAND ACTS—*Costs—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 80, 82—*Order appointing trustees of settlement for purposes of Settled Land Acts.*] By deed of re-settlement, made in 1881 estates were limited (subject to charges created by a deed of settlement of 1850) to the use of *H.* for life, with remainders over. Both deeds contained powers of sale, but the trustees were not the same persons. Portions of one of the estates were taken by a railway company, under compulsory powers, which incorporated the Lands Clauses Consolidation Act, 1845, and the purchase-money was paid into Court. For the purpose of having it paid out, *H.* applied in the matter of that estate to have *W.* and *L.*, the trustees of the deed of 1881, appointed trustees for the purposes of the Settled Land Act, 1882, of the compound settlement consisting of the said two deeds, and an order was made accordingly. On an application by *H.* for payment out of Court of the purchase-money to *W.* and *L.*:—*Held*, that the railway company ought not to be ordered to pay the costs of obtaining the order appointing *W.* and *L.* trustees for the purposes of the Settled Land Act. *In re Waterford and Limerick Railway Company* ; *Ex parte Baron Harlech* V.-C. 507

SETTLED LAND ACTS—*continued.*

—— Vendor and vendee—Petition for sale by tenant for life - - - - 273
See Tenant for Life.

SETTLEMENT—Voluntary deed—Rectification - - - - 435, 441
See Reformation of Deed.

SEVERAL FISHERY—*In non-tidal waters—Judgment* inter partes—*Privies in estate—Estoppel—Question of public interest—Evidence—Admissibility.*] A judgment *inter partes* is an estoppel against privies in estate only where the estate has been acquired by the person sought to be estopped subsequently to the date of the judgment. The conversion of an existing renewable leasehold into a fee-farm grant is not the acquisition of a new estate for this purpose. A claim by an individual to a several fishery in non-tidal waters is not a question of public interest on which a judgment which does not work an estoppel is admissible against strangers. A title to a several fishery may be sufficiently established by user to justify its sale under the provisions of the Landed Estates Court Act. *In re De Burgho's Estate*; *Scottish Widows' Fund and Life Assurance Society, Petitioners* [Madden, J. 274

SEVERANCE—Joint tenancy - - 401
See Joint Tenants.

SHARES—Legacy—Misdescription - 418
See Masses.

—— Notice of equitable rights in—Company—Articles of association—Lien 532, 571
See Lien.

SHERIFF—Civil bill decree—Protection order
See Arranging Debtor. [44

SHIP—Order appointing receiver—Winding up—Secured creditor - - - 29
See Winding up.

SOLICITOR—Trustee—Advice as to investment
See Trustee. 2. [18

SPECIAL OCCUPANCY—*Estate* pur autre vie—*Executory agreement*—1 *Vict. c.* 26, *s.* 6.] Decision of the Court of Appeal [1895] 1 Ir. R. 63 affirmed by the House of Lords: *More-Smyth* v. *Earl of Mountcashell* - - - H. L. 243

SPECIFIC DEVISE—*Lease accompanied by loan of money—Proviso for reduction of rent—Option of purchase—Specific devise of demised premises—Residuary estate—Realty or personalty.*] *A.* made a lease for years of certain premises to *B.*, containing a proviso that the rent thereby reserved was to be reduced on the exercise of an option given to *B.*, his executors, administrators, and assigns, of purchasing it for £350. A sum of £350 was advanced by *A.* to *B.*, to enable him to put buildings on the demised premises, in pursuance of a building covenant contained in the lease; and by deed of covenant of the same date as the lease *B.* bound himself, his heirs and personal

SPECIFIC DEVISE—*continued.*

representatives, to pay off the £350 within six years. In default of such payment there was a power of sale given to *A.* and his representatives; and it was provided that until this sum was paid the rent of the premises should be the original amount reserved by the lease. Many years afterwards *A.* by his will specifically devised the demised premises to his son *G.*, and after certain other dispositions devised the residue and remainder of his property to trustees upon certain trusts. At the time of his death *A.* was the owner in fee of the demised premises. After the death of *A.* the person in whom the interest of *B.* was then vested paid the sum of £350 to the administratrix of *A.*:—*Held*, that the sum of £350 passed under the specific devise of the demised premises to *G.*, contained in *A.*'s will, and not under the devise of his residuary estate: *Duffield* v. *M'Master* M. R. 370

—— Devise of "all my estate and interest in the lands of A"—Beneficial interest of testator in mortgage thereon held to pass
See Mortgage. 2. [511

STATUTE OF LIMITATIONS.
See Limitations, Statute of.

STATUTES:—

10 Car. 1, sess. 2, c. 3—Fraudulent Conveyances
See Merger. [45

3 & 4 Wm. 4, c. 27—Limitations, ss. 2, 24, 40
See Limitations, Statute of. 2. [590

1 Vict. c. 26—Wills, s. 6 - - - - 243
See Special Occupancy.

8 Vict. c. 18—Lands Clauses, ss. 80, 82 - 507
See Settled Land Acts.

21 & 22 Vict. c. 72—Landed Estates Court, s. 47
See Tenant for Life. [273

23 & 24 Vict. c. 154—Landlord and Tenant, s. 10
See Covenant against Alienation. [520

25 & 26 Vict. c. 89—Companies, s. 30 532, 571
See Lien.

—— s. 163 - - - - - - - 29
See Winding up.

—— s. 199 - - - - - - - 265
See Tramway Company.

35 & 36 Vict. c. 58—Bankruptcy, s. 4 - 29
See Winding up.

37 & 38 Vict. c. 57—Limitations, ss. 1, 2, 8 590
See Limitations, Statute of. 2.

40 & 41 Vict. c. 57—Supreme Court of Judicature (Ireland), s. 28 (1) - - - - 29
See Winding up.

44 & 45 Vict. c. 41—Conveyancing - 40
See Husband and Wife.

45 & 46 Vict. c. 38—Settled Land - 273
See Tenant for Life.

51 & 52 Vict. c. 59—Trustees, s. 8 206, 223, [340, 345
See Limitations, Statute of. 1.
Trustee. 1.

STATUTES—*continued.*
54 & 55 Vict. c. 57—Redemption of Rent, s. 1
See Redemption of Rent. [285
54 & 55 Vict. c. 66—Local Registration of Title, s. 22 - - - - - - 285
See Redemption of Rent.
59 & 60 Vict. c. 47—Land Law, s. 40 (1) 614
See Land Law (Ireland) Acts.

STATUTORY REMEDY—Judgment creditor —Receiver—Winding up - - 265
See Tramway Company.

STOCK—Bequest of shares—Misdescription 418
See Masses.

SUBSTITUTED GIFT—Will—Construction— "Family"—Joint tenancy - 600
See Family.

SUBSTITUTION OF SERVICE—*Originating summons — Affidavit — British subject.*] On an application for liberty to substitute service of an originating summons where the defendant resides out of the jurisdiction, the order will not be made unless the affidavit in support of the application states that the defendant is a British subject. *Fitzsimons* v. *Skelly* - - - M. R. 416

SUMMONS—Originating—Service out of the jurisdiction - - - - 334
See Service out of the Jurisdiction.
—— Originating—Substitution of service—Affidavit—British subject - - 416
See Substitution of Service.

TENANCY IN COMMON — Substitutionary gift—Will—Construction - - 600
See Family.

TENANT FOR LIFE—*Vendor and vendee—Petition—Settled Land Act,* 1882—*Landed Estates Court Act, sect.* 47.] A tenant for life who has entered into a contract for sale of the fee-simple under the Settled Land Acts, 1882–1890, is entitled to present a petition for sale as a vendor under the 47th section of the Landed Estates Court Act. *In re Mahon's Estate* - - Madden, J. 273
—— Acquiescence in breach of trust—Interest—Liability of trustee - - 340, 345
See Trustee. 1.
—— Merger of charge voluntarily acquired 45
See Merger.
—— Will—Construction - - - 249
See Estate Tail.

TENANT FOR LIFE AND REMAINDERMAN—Mortgage vested in trustees—Power to give receipts—Statute of limitations - - - - - - 590
See Limitations, Statute of. 2.

TENANT IN TAIL
See Estate Tail.

TIME—Contingent legacy - - 295, 301
See Death coupled with Contingency.

TRAMWAY COMPANY—*Winding-up—Mortgage—Judgment creditor—Companies Act,* 1862 (25 *& 26 Vict. c.* 89), *s.* 199—*Statutory remedy.*] The Court has jurisdiction, under sect. 199 of the Companies Act, 1862, to make an order to wind up a Tramway Company consisting of more than seven members, incorporated by Order in Council pursuant to the Tramway (Ireland) Acts. Where the Order in Council, after giving borrowing powers, expressly provided that mortgagees might enforce payment by the appointment of a receiver:—*Held*, that this did not preclude a mortgagee who had obtained judgment against the Company from obtaining a winding-up order. *In re Portstewart Tramway Co; Ex parte O'Neill* M. R. [265

TRUSTEE—*Breach of trust—Improper investment—Extent of liability—Lapse of time—Action by* cestui que trust—*Statute of Limitations—Interest on money lodged in Court to satisfy breach of trust during lifetime of tenant for life, who has acquiesced in breach of trust—Trustee Act,* 1888 (51 *& 52 Vict. c.* 59), *s.* 8.] By a settlement, executed on the 7th July, 1873, on the marriage of *J. G. C. and E. M. C.* (the plaintiff), of which *E. F. W.* and *C. M. H.* were trustees, the following property was put in settlement:—(1) a policy of insurance for £1000 on the life of *J. G. C.*; (2) two policies of insurance for £200 each on the life of *J. L.*; (3) six shares of £20 10*s.* in the Great Western Railway of Canada; and (4) a sum of £400 on deposit receipt in the Munster Bank at Cork. The property was settled upon trust for the plaintiff for life, with remainder to the children of the marriage, and the settlement contained a power to advance £400 out of the trust funds to the husband *J. G. C.* There were six children issue of the marriage. *J. L.* having died, a sum of £516, representing the two policies on his life, was paid to *E. F. W.* in April, 1877, and was lent by *E. F. W.* and *C. M. H.* to *J. G. C.* without security, and was lost. The £400 invested on deposit receipt in the Munster Bank was advanced to *J. G. C.* under the power. In 1879 *E. F. W.* retired from the trusteeship, and *S. J. S.* was appointed trustee in his stead. The trustees neglected to obtain a transfer of the Canadian Railway shares, which remained in the name of the plaintiff until 1884, when she transferred them to *C. M. H.* On the 1st March, 1884, *C. M. H.* sold these shares for £79 8*s.*, and appropriated the proceeds. *J. G. C.* died in 1895. In an action brought by *E. M. C.* and the minor children against *E. F. W.*, *C. M. H.*, and *S. J. S.* to replace the trust fund and for an account, *E. F. W.* lodged £516 in Court, and pleaded the Statute of Limitations:—*Held*, by the Vice-Chancellor, that *E. F. W.* was liable to pay interest at £4 per cent. on the sums of £516 and £79 to *E. M. C.* during

TRUSTEE—*continued.*
her life:—*Held,* on appeal (reversing the decision of the Vice-Chancellor), that, by virtue of the Trustee Act, 1888, s. 8, on *E. F. W.* lodging the £516 as he had done, and upon his paying the proceeds of sale of the Canadian Railway shares, in case of the default of *C. M. H.* so to do, no interest was payable to the plaintiff *E. M. C.* during her life, but that such interest was payable to the trustee *E. F. W. Collings* v. *Wade* V.-C. [340 ; App. 345

2. —— *Liability of trustee for trust-money lost by reason of defect in title—Solicitor employed—Unauthorised investment.*] In the year 1838 the trustees of a marriage settlement invested portion of the trust funds on an assignment of an appointed share of a fund. The appointment purported to be made in execution of a joint power by a husband and wife, but the deed had not been executed by the wife. The trustees had employed a solicitor to act for them in preparing the assignment and to transact the legal business connected with it. The trustees also invested portion of the trust funds on an assignment of judgments. The judgments had not been revived or redocketed, as required by 9 Geo. 4, c. 35. The power given to the trustees was confined by the settlement to an investment on real securities, and it contained a proviso that investments were to be made "without risk to the trustees":—*Held,* that the trustees were not liable for the loss occasioned by the non-execution of the power of appointment, but that they were liable for any loss occasioned by the unauthorised investment of the trust funds on the security of an assignment of judgments, they not being "real securities," and that the proviso, that the investments should be without risk to the trustees, only protected them while acting within the scope of their power. *Rochford* v. *Seaton* [V.-C. 18

—— English Bankruptcy—Title, how far impeachable - - - 442, 473
See UNCONSCIONABLE BARGAIN.

—— Mortgage vested in—Power to give receipt—Statute of Limitations - - 590
See LIMITATIONS, STATUTE OF. 2.

—— Persons claiming through - 206, 223
See LIMITATIONS, STATUTE OF. 1.

—— Settled Land Acts—Costs of appointing—Compulsory purchase - - 507
See SETTLED LAND ACTS.

—— Shares registered in name of—Company—Articles of association—Lien 532, 571
See LIEN.

—— Trust term—Vesting in new trustees—Limited administration - - 200
See ADMINISTRATION. 2.

UNCONSCIONABLE BARGAIN—*Reversionary interest—Estate falling into possession—Purchase of equity of redemption by mortgagee—Confirmation of prior dealings—English bankruptcy—Title of trustee—Redemption suit—Offer to redeem—Amendment—Costs.*] *A,* who was a young man of improvident habits, and entitled in reversion, expectant on the death of his father, to an estate for life in certain lands, and in a mortgage for £3000 and a sum of £200 railway stock, applied to the defendant, who was a professional money-lender at high rates of interest, for an advance of £140 on the security of his reversionary property, and by deed, dated the 18th June, 1889, mortgaged it to the defendant to secure £140 principal and £5 stated to be agreed upon as the costs of making searches and preparing, stamping, and registering the deed, with interest at £60 per cent. He also gave a promissory note at six months for £140 2*s.* The mortgage was framed to secure future advances, including interest, with monthly rests, commission, and other charges, and included a power of sale exercisable without notice. On the occasion of this transaction the defendant advised *A* to have an independent solicitor to act for him, but *A* declined to do so, and signed a document to that effect. *A* having been subsequently informed by the defendant that the mortgage had been stamped to cover an advance of £400, borrowed a further sum of £260 from the defendant, and gave a promissory note for the amount, payable in three years. A policy of insurance for £800 was effected on *A's* life, and was assigned to the defendant. In October, 1889, *A* borrowed a further sum of £140, and on the 17th October, 1889, he executed to the defendant a further mortgage of his said reversionary property to secure the repayment of this amount at £60 per cent. interest, with a proviso that the amount should not be paid off for three years without the defendant's consent. Another policy of insurance was effected on his life for £400, and assigned to the defendant. The premiums on the policy were charged on the mortgaged property. On the 17th July, 1890, a writ was issued by *A* in the Chancery Division to set aside the two deeds of mortgage and the promissory notes upon payment of the principal amount advanced and £5 per cent. interest. A statement of claim was delivered on the 5th March, 1891, but no further steps were taken in this action. In January, 1891, *A's* father died, and *A,* who had borrowed a large sum of money, after the defendant's advances, from London money-lenders, and was desirous of leaving the country, had an interview with the defendant with the view of disposing of his equity of redemption in the mortgaged property. The defendant agreed to give him £250 as an advance on the mortgages and £120 as the

UNCONSCIONABLE BARGAIN—*continued.*
UNCONSCIONABLE BARGAIN—*continued.*
consideration for the purchase. On the 31st March, 1891, *A* signed an agreement, whereby, in consideration of an advance of £250, repayable on the 13th July, 1892, he confirmed the deeds of mortgage of the 18th June, and 17th October, 1889, and undertook to change his solicitor, to discontinue the Chancery action, and to appoint the defendant mortgagee in possession. On the 3rd April, 1891, *A* executed a deed conveying the equity of redemption to the defendant in consideration of £120. *A* then appointed a new solicitor in the Chancery action, who, by his instructions, entered a rule to change, and discontinued the action. *A* received the money from the defendant, and went abroad. He was adjudicated bankrupt by his English creditors on the 19th April, 1892, and the plaintiff was appointed trustee. The defendant having presented a petition for sale of the lands in the Land Judge's Court on foot of another incumbrance, the plaintiff, on the 15th February, 1893, brought an action to set aside the mortgages of 18th June and 17th October, 1889, the agreements of 31st March, and the conveyance of the 3rd April, 1891. The statement of claim, as delivered, did not contain any offer to redeem. At the trial of the action, upon oral evidence, Monroe, J., arrived at the following conclusions of fact:—I. As regards the mortgages and assignments of the policies—(*a*) that the several transactions were entered into at the instance of *A*, and not by the inducement of the defendant; (*b*) that *A* understood the nature and material parts of the contracts, except the provision as to monthly rests; (*c*) that *A* was not advised by any independent solicitor, but that this was his own fault; (*d*) that *A* was not suffering from any pecuniary pressure beyond that he was reckless and improvident, and ready to accept money on any terms to supply him with the means of dissipation; (*e*) that the property comprised in the mortgages of the 18th June, 1889, and the 17th October, 1889, with the policies of insurance, gave ample security for the money advanced. II. As regards the sale of the equity of redemption—that at the time of the conveyance of April, 1891, *A* had no idea of the charges on his property, or what the equity of redemption was worth, and that he was at that time deplorably at a loss for money. Upon these conclusions of fact, Monroe, J., *held*:—1. That the mortgages of the 18th June, 1889, and 17th October, 1889, were hard and unconscionable bargains, and should only stand as securities for the amounts advanced, and interest at 5 per cent. 2. That, as regards the transaction of April, 1891, and the agreements immediately preceding it, *A* and the defendant were not on an equal footing, and that it therefore lay on the defendant to show that the bargain was fair and reasonable, and that the property was not sold at an undervalue; and the Court being of opinion that the purchase-money was grossly under the value of the property sold, *held* that the conveyance of the 3rd April, 1891, should also stand as a security only for the amounts advanced and interest at 5 per cent., and that there was no valid confirmation of the mortgages of 1889. 3. That it was not competent for the defendant to question, in the present action, the validity of the English bankruptcy proceedings, and the consequent title of the plaintiff as trustee to sue, even on the grounds of champerty and maintenance by the creditors who obtained the adjudication. The decision of Monroe, J., on these points was affirmed by the Court of Appeal. Observations upon a mortgagee purchasing the equity of redemption from a mortgagor at an undervalue. Monroe, J., gave the plaintiff leave at the hearing to amend the statement of claim by inserting an offer to redeem, though resisted by the defendant. Monroe, J., directed each party to abide their own costs of the action. His Lordship's decision in this respect was not altered by the Court of Appeal: *Kevans* v. *Joyce* - - Monroe, J., 442; App. 473.

USER—Evidence—Several fishery—Sale, Land Judge's Court - - - - 274
See Several Fishery.

VENDOR AND PURCHASER—Conditions of sale—Release of testamentary power
See Power. [383, 390
—— Tenant for life—Petition for sale in Land Judge's Court - - - - 273
See Tenant for Life.
—— Term of years—Administrator *durante minore ætate* - - - - 356, 362
See Administrator.
—— Term of years—Assignment by executor after judgment in administration suit 401
See Executor.

VOLUNTEER—Merger of charge - 45
See Merger.
—— Reformation of deed—Death of settlor
See Reformation of Deed. [435, 441

WILL—Annuity charged on real estate only
See Annuity. 3. [427
—— Codicil—Erroneous recital—Residue . 331
See Residuary Gift.
—— Condition subsequent—Impossibility of performance - - - - 418
See Masses.
—— Death coupled with contingency 295, 301
See Death coupled with Contingency.
—— Devise of "all testator's estate and interest in the lands of *A*"—Beneficial interest of testator in mortgage on same lands held to pass - - - - 511
See Mortgage. 2.

WILL—*continued.*

—— Devise of lands charged with annuity—Part of lands withdrawn by title paramount—No abatement - - - - - 494
See ANNUITY. 2.

—— Election - - - - - - 1
See ELECTION.

—— Execution - - - - - - 269
See EXECUTION OF WILL.

—— Executor—Assent to legacy—Judgment in administration suit - - - 401
See EXECUTOR.

—— "Family"—Substitutionary gift—Grandchildren not included in—Joint tenancy
See FAMILY. [600

—— Gift to children in priority—Sons to inherit before daughters - - - 249
See ESTATE TAIL.

—— Legacy in satisfactson of debt—Evidence
See LEGACY DUTY. [283

—— Misdescription of legacy—Shares—Stock
See MASSES. [418

—— Perpetuity - - - - - - 418
See MASSES.

—— Specific devise—Lease with option of purchase - - - - - - 370
See SPECIFIC DEVISE.

—— Testamentary power—Release 383, 390
See POWER.

WINDING UP—*Company—Liquidator—"Secured creditor"—Equitable execution—Order appointing receiver over ship—Judicature (Ireland) Act,* 1877, *sect.* 28 (1)—*Bankruptcy (Ireland) Amendment Act,* 1872, *sect.* 4—*Companies Act,* 1862, *sect.* 163.] A judgment creditor of a limited Company obtained an order appointing him receiver over the beneficial interest of the Company in a ship, subject to incumbrances. The creditor took no further step to enforce payment, and a winding-up order was made:—*Held,* that the receivership order did not make the judgment creditor a secured creditor of the Company. The expression "secured creditor" in sect. 28 (1) of the Judicature (Ireland) Act, 1877, has the same meaning as regards a Company in liquidation as it has under the Bankruptcy (Ireland) Amendment Act, 1872, sect. 4, namely, "a creditor holding a mortgage, charge, or lien on the debtor's estate as security for a debt due to him." *In re Lough Neagh Ship Company; Ex parte Thompson* - - - M. R. 29

—— Tramway Company — Receiver Statutory remedy - - - - - 265
See TRAMWAY COMPANY.

WORDS—"Benefit"—Will - - 143
See ADVANCEMENT.

—— "Families"—Will - - - 600
See FAMILY.

—— "First and readiest of means"—Marriage contract - - - - 149, 162
See ANNUITY. 1.

—— "Offensive business"—Lease 76, 164
See HOSPITAL.

—— "Present right to receive"—37 & 38 Vict. c. 57, s. 8 - - - - 590
See LIMITATIONS, STATUTE OF. 2.

—— "Real securities"—Power - - 18
See TRUSTEE. 2.

—— "Secured creditor"—Judicature (Ireland) Act, 1877, s. 28 (1) - - 29
See WINDING UP.

—— "Vested"—Will - - - - 143
See ADVANCEMENT.

—— "Without risk to the trustees"—Settlement - - - - - 18
See TRUSTEE. 2.

THE END.